

## APAAC Sex Crimes Seminar 2014: Expert testimony issues

This segment of the seminar materials will focus on three recurring issues that arise in cases where the State has presented expert testimony regarding the behavioral characteristics of the victims and perpetrators of sex crimes involving children:

- whether such expert testimony impermissibly vouches for the credibility of the victim;
- whether this testimony constitutes inadmissible profile evidence; and
- whether such testimony remains admissible in light of the revisions to Arizona Rule of Evidence 702, which adopted the federal standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

For the sake of clarity, this outline was prepared based upon Wendy Dutton's actual trial testimony regarding the following subjects:

(1) The five stages in the "process of victimization," which one prominent Arizona expert witness enumerated as follows: "[1] victim selection followed by [2] engagement or developing a relationship with the victim, [3] grooming which is introducing physical contact and sexuality, then [4] the actual sexual assault, and then [5] concealment, referring to how perpetrators encourage children to remain silent about the abuse." In a recent trial for sexual conduct with a minor now pending review by the Arizona Supreme Court Wendy Dutton defined these five stages as follows:

(A) **Victim selection** by the perpetrator: "there are characteristics of children that make them more vulnerable or acquiescent to abuse than other children," such as physical and cognitive disabilities, young age, introversion or low self-esteem, missing parents, etc.

(B) "**Engagement** refers to how children often report that they are abused by someone they know, someone they trust or someone within their own family ... and sometimes of course this is a parent because the abuser is a family member." Common tactics include offering the victims gifts or financial assistance, compliments on appearance, and statements that the perpetrator cares and promises to protect them.

(C) "**Grooming**" is the initiation of physical contact with the child, such as during wrestling or tickling games, snuggling, back rubs, and horseplay, all of which "erode children's barriers to physical contact" and make "physical contact seem normal between the child and the perpetrator." Grooming also includes

sexual conversations, discussions about the birds and the bees, exposure to pornography, or nudity in the household.

**(D) Initial assaults** “can occur during, for example, horseplay or wrestling game or tickling game where the child reports that the tickling becomes intrusive or the perpetrator might seemingly accidentally grope or touch their breast or genitals during that ... session and ... wait and see how the child reacts to that.” If the child resists or attempts to distance himself, the perpetrator stops, “but if the child acquiesced and seems to accommodate the perpetrator’s behavior, that can often serve as an opening for more intrusive behavior to come.” “It’s not uncommon [that the actual abuse comes in progressive stages],” meaning from fondling to actual penetration.

**(E) Concealment:** methods include telling the victim that this is a secret and “if anybody found out we would both be in big trouble,” or offering incentives like gifts or money or privileges in exchange for their silence.

## **(2) Testimony regarding the characteristics of child sex-crime victims:**

**(A) Resistance versus acquiescence:** “Typically [victims] do not fight back or resist abuse or tell right away,” but more commonly learn to cope or accommodate the abuser.

**(B) How children cope with sexual abuse:** besides daydreaming or pretending to visit another place while being abused, victims “might even start thinking about the perpetrator as their boyfriend or girlfriend and focus on the pleasurable sensations that are occurring to their body as a way of distancing themselves from the emotional or traumatic aspects of the abuse.”

**(C) Behavioral changes to abuse:** “One of the characteristics that we commonly see in children is that many of them show no change in their behavior. They show no emotional or behavioral or psychological symptoms that would indicate to somebody else that there is a problem. That being said, when children do show symptoms, they show a wide variety of symptoms.” In older children, the common symptoms include “aggression, sexual acting out, suicidal behavior, self-mutilation, promiscuous sexual behavior, and those kinds of things.” Dutton recognizes that these symptoms could have other causes, such as being raised by alcoholic or violent parents. “So there is no one symptom or pattern of symptoms we see in every sexually abused child because there is such a wide range, including showing no symptoms at all.” “Based solely on symptom or symptoms alone, we cannot [say, yes, that child has been sexually abused].”

**(D) Delayed disclosure:** Children might not report abuse “right away.” “For most children, it has to do with fear, either fear of the perpetrator or fear of not being believed or fear of the consequences their disclosure could have.” Fear

of being disbelieved occurs “especially if your abuser is a trusted adult.” Children might also fear getting into trouble because they view themselves “as though they are a partner in the abuse as opposed to a victim” and “assume responsibility for what happened or feel like they have done something wrong to either cause abuse to happen in the first place or to allow it to continue.” Also, long delays may be caused by a close relationship with the abuser to whom children “feel a sense of loyalty” and “care about” and “upon whom they depend for food, shelter or clothing or love for that matter.” Dutton also explains that disclosure might be delayed because victims assume “shared responsibility” for the abuse as a result of receiving bribes, accepting gifts, or experiencing sexual pleasure from the perpetrator.

**(E) Piecemeal versus full disclosure:** Dutton testified that children “do not always” give “full disclosure right from the beginning” because “it’s common for children to test the waters first, meaning they perhaps will talk about the aspects of the abuse that are the least embarrassing or least shameful for them to talk about and they will see how people react. If their initial disclosure is met with support and belief, then they may disclose additional details or incidents of abuse. ... So it’s not uncommon for more details or additional incidents to come out over time.” “For example, it’s not uncommon for children to be afraid of disclosing to their mother all the details of the abuse, especially if the mother is involved in a relationship with the abuser. Children are also aware that what they have to say will be harmful to their mother.”

**(F) Demeanor of children during disclosure:** abused children display “a wide range of reactions,” including anger, crying and sadness, inappropriate giggling, embarrassment, being uncooperative or uncommunicative, or “very flat or robotic expressions.”

**(G) Malicious false allegations:** False allegations “tend to occur in usually one of two situations.” The first “generally” occurs in younger children whose parents are involved in a high conflict divorce or custody dispute, and one parent encourages a false allegation against the other. The second situation arises when teenage girls seek secondary gain, like changing their living arrangements, evicting a disliked man from the household, or concealing consensual sexual activity from her parents. Dutton’s script mentions that false allegations are also common among teenage girls who have serious mental illnesses or flashbacks to prior sexual abuse. Dutton has testified that “research indicates that [malicious false allegations] are not very common.”

**N.B. This aspect of Dutton’s testimony is improper and prompted the author to address it in the third topic of this outline. Division Two of the Arizona Court of Appeals issued a published opinion addressed the propriety of Dutton’s testimony that “false allegations occur less than 10 percent of the time,” with the “most common”**

situations being when the purported victims are either “younger children whose parents are involved in a high-conflict divorce or custody dispute” or “adolescent females,” whose allegations are usually driven by an “ulterior motive or secondary gain.” *State v. Herrera*, 232 Ariz. 536, 550-51, ¶¶ 43-48, 307 P.3d 103, 117-18 (App.2013). The State avoided reversal only because of a confluence of fortuitous events that might not exist in other cases—the defendant’s failure to object limited the appellate court to fundamental-error review, the testimony regarding the victims most likely to make false allegations (adolescent girls) supported the defendant’s defense that his adolescent stepdaughter sought secondary gain, the court instructed the jurors that they were not bound by expert testimony and should give expert testimony only the weight they believed it deserved, and the State presented overwhelming extrinsic evidence of guilt.

**Significantly, the experts called by Arizona prosecutors give “blind” testimony and profess unfamiliarity with the facts of the case. Furthermore, our prosecutors do not elicit opinions that the behavior of the victim and/or the defendant is consistent with sexual abuse, or that the victim is credible—which is fortunate because, as shall be explained below, such testimony would be inadmissible.**

**This outline will go beyond the general testimony that Arizona prosecutors generally offer through its blind experts. The Alaska Supreme Court provides us with a good framework for identifying the kinds of expert testimony that prosecutors nationwide have (properly or improperly) presented in child sex-crime cases:**

There are generally four categories of expert testimony that might be presented in these cases: (1) an explanation of typical behaviors or symptoms of known sexually abused children that are apparently inconsistent with abuse, such as delayed or inconsistent reporting, to rebut claims that those behaviors show no abuse occurred; (2) an explanation that some behaviors are commonly observed in sexually abused children and that the child in the case fits those behaviors; (3) expert opinion that the child has been abused based on the expert's evaluation; and (4) expert opinion, based on his or her evaluation, that the child has been abused and that the allegations of abuse are therefore truthful. [Footnote omitted.] For purposes of discussion, we label these categories of testimony respectively as (1) rehabilitative or rebuttal testimony; (2) profile or syndrome testimony; (3) ultimate issue testimony (under Alaska Evidence Rule 704); and (4) vouching testimony.

***L.C.H. v. T.S.*, 28 P.3d 915, 924 (Alaska 2001). Please note that although this case is useful in delineating the categories of expert testimony regarding the behaviors of child sex-crime victims, Arizona precedent allows just the *first* category—rehabilitative/rebuttal testimony offered to show that behaviors, such as delayed or piecemeal disclosure and recantations, are not inconsistent with sexual abuse.**

**Because courts refer to many of the behaviors exhibited by child sex-crime victims as components of the Child Sexual Abuse Accommodation Syndrome (CSAAS) developed by Dr. Roland Summit, the reader will find helpful the following passage detailing this analytical construct:**

The child sexual abuse accommodation syndrome, or CSAAS, “represents a common denominator of the most frequently observed victim behaviors.” *Ibid.* CSAAS includes five categories of behavior, each of which contradicts “the most common assumptions of adults.” [ROLAND C. SUMMIT, THE CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME, 7 CHILD ABUSE & NEGLECT 177 (1983)], 7 Child Abuse & Neglect at 181. Of the five categories, he described two as “preconditions” to the occurrence of sexual abuse and the remaining three as “sequential contingencies” to the abuse “which take on increasing variability and complexity.” *Ibid.* Obviously, the “preconditions” continue into and characterize the period of abuse.

The first of the preconditions is secrecy: child abuse happens only when the child is alone with the offending adult, and the experience must never be disclosed. That secrecy is frequently accompanied by threats: “‘This is our secret; nobody else will understand.’” “‘Don’t tell anybody.’” “‘Nobody will believe you.’” “‘Don’t tell your mother; (a) she will hate you, ... (c) she will kill you,’” and the like. SUMMIT, *SUPRA*, 7 CHILD ABUSE & NEGLECT at 181. From the secrecy, the child gets the impression of danger and fearful outcome. *Ibid.* In this case, Norma and Connie testified that they had not reported the alleged abuse because defendant had told them that if they did, he would hit them and they would get into more trouble than he.

The second precondition is helplessness. Dr. Summit explains that the abused child's sense of helplessness is an outgrowth of the child's subordinate role in an authoritarian relationship in which the adult is entrusted with the child's care, such as the parent-child relationship. Summit, *supra*, 7 Child Abuse & Neglect at 182. The prevailing reality for the most frequent victim of child sexual abuse is a sense of total dependence on this powerful adult in the face of which the child's normal reaction is to “play possum.” *Id.* at 182–83.

The third aspect of the syndrome, also the first of what Dr. Summit identifies as a sequential contingency, is a combination: the child feels trapped by the situation (entrapment), and that perception results in the behavior of accommodating the abuse (accommodation). Because of the child's helplessness, the only healthy option left is to survive by accepting the situation. “There is no way out, no place to run.” Summit, *supra*, 7 Child Abuse & Neglect at 184. Adults find that hard to believe because they lack the child's perspective, but “[t]he child cannot safely conceptualize that a parent might be ruthless and self-serving; such a conclusion is tantamount to abandonment and annihilation.” *Ibid.* The roles of parent and child become reversed: it is the child who must protect the

family. The abuser warns, “If you ever tell, they could send me to jail and put all you kids in an orphanage.” SUMMIT, SUPRA, 7 CHILD ABUSE & NEGLECT at 185.

The fourth aspect, then, is delayed, conflicted and unconvincing disclosure. *Id.* at 186. Most victims never disclose the sexual abuse—at least not outside the immediate family. Dr. Summit found that family conflict triggers disclosure, if ever, “only after some years of continuing sexual abuse and an eventual breakdown of accommodation mechanisms.” *Ibid.*

Allegations of sexual abuse seem so unbelievable to most that the natural reaction is to assume the claim is false, especially because the victim did not complain years ago when the alleged abuse was ongoing. *Ibid.* Dr. Summit surmises that

[u]nless specifically trained and sensitized, average adults, including mothers, relatives, teachers, counselors, doctors, psychotherapists, investigators, prosecutors, defense attorneys, judges and jurors, cannot believe that a normal, truthful child would tolerate incest without immediately reporting or that an apparently normal father could be capable of repeated, unchallenged sexual molestation of his own daughter. [*Ibid.*]

There are very few clues to such abuse. Most women (indeed, even this mother) do not believe it possible that a man whom she loved would ever be capable of molesting his or her own children. SUMMIT, SUPRA, 7 CHILD ABUSE & NEGLECT at 187.

The fifth and final aspect is retraction. Although this case does not involve retraction, that “[w]hatever a child says about sexual abuse, she is likely to reverse it” appears to be a fact. SUMMIT, SUPRA, 7 CHILD ABUSE & NEGLECT at 188 (emphasis omitted). The post-disclosure family situation tends to confirm the victim's worst fears, which encouraged her secrecy in the first place, i.e., her mother is disbelieving or hysterical, her father threatened with removal from the home, and the blame for this state of affairs placed squarely on the victim. *Ibid.* Once again, because of the reversed roles, the child feels obligated to preserve the family, even at the expense of his or her own well being. The only “good” choice, then, is to “capitulate” and restore a lie for the family's sake. *Ibid.*

Dr. Summit analogizes the gradual acceptance of the reality of child sexual abuse to society's changing attitude towards adult rape with the emergence of the rape trauma syndrome theory (RTS). SUMMIT, SUPRA, 7 CHILD ABUSE & NEGLECT at 189 (citing ANN W. BURGESS & LINDA L. HOLMSTROM, RAPE TRAUMA SYNDROME, 131 AM.J. OF PSYCHIATRY 981 (1974) [hereinafter BURGESS & HOLSTROM] ). Women were assumed to cause rape, in the absence of a consistent clinical understanding of the “psychological climate,” and reactions to such sexual attacks. SUMMIT, SUPRA, 7 CHILD ABUSE & NEGLECT at 189. Thus,

“Those who reported often regretted their decision as they found themselves subjected to repeated attacks on their character and credibility.” *Ibid.* The gradual departure from the mythology of women and rape so recently outlined by our Court in *In re M.T.S.*, 129 N.J. 422, 432–33, 443–45, 609 A.2d 1266 (1992) (dispelling myth that victim's silence in response to sexual assault equals consent), and *State v. Hill*, 121 N.J. 150, 157–66, 578 A.2d 370 (1990) (dispelling myth that victim's failure immediately to report an alleged sexual assault tends to show that she was not assaulted at all), has slowly been extended to child-abuse victims.

Hence, the behavioral studies of CSAAS are designed not to provide certain evidence of guilt or innocence but rather to insure that all agencies, including the clinician, the offender, the family, and the criminal justice system, offer “the child a right to parity with adults in the struggle for credibility and advocacy.” Summit, *supra*, 7 Child Abuse & Neglect at 191. CSAAS achieves that by providing a “common language” for analysis and a more “recognizable map” to the understanding of child abuse. *Ibid.*

*State v. J.Q.*, 617 A.2d 1196, 1203-05 (N.J.1993)

#### **Rebuttal/rehabilitative use of behavioral-characteristics evidence**

**1. Although some states preclude this evidence, see *Sanderson v. Commonwealth*, 291 S.W.3d 610 (Ky.2009); *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa.1992), Arizona and most other jurisdictions have held that the prosecution may call experts to give generalized testimony explaining that aspects of a sex-crime victim's behavior that seem inconsistent with sexual abuse—such as delayed or piecemeal disclosure, recantation of allegations, or continued interaction with the victim—are common to children who were sexually abused. An illustrative example is *State v. Moran*, wherein the Arizona Supreme Court upheld expert testimony regarding the reasons why child sex-crime victims recant their allegations or engage in other behavior inconsistent with abuse:**

[*State v.*] *Lindsey* recognized that expert testimony on recantation and other problems afflicting sexual abuse victims may explain a victim's seemingly inconsistent behavior and aid jurors in evaluating the victim's credibility. 149 Ariz. [472,] 474, 720 P.2d [73,] 75 [(1985)]. Other jurisdictions, recognizing the usefulness of expert testimony in child sexual abuse cases, also allow experts to explain general behavioral characteristics of child victims. *E.g.*, *People v. Dunnahoo*, 152 Cal.App.3d 561, 577, 199 Cal.Rptr. 796, 804 (Cal.Ct.App.1984) (testimony explaining delay in reporting); *Smith v. State*, 100 Nev. 570, 571–72, 688 P.2d 326, 326–27 (1984) (same); *People v. Benjamin R.*, 103 A.D.2d 663, 668–69, 481 N.Y.S.2d 827, 831–32 (N.Y.App.Div.1984) (same); *State v. Middleton*, 294 Or. 427, 436–37, 657 P.2d 1215, 1220 (1983) (recantation, truancy, and tendency to run away from home); *Commonwealth v. Baldwin*, 348 Pa.Super. 368, 372–73, 502 A.2d 253, 255 (Pa.Super.Ct.1985) (reporting delays and inconsistent versions of abuse); *State v. Petrich*, 101 Wash.2d 566, 575–76,

683 P.2d 173, 179–80 (1984) (delay in reporting). Oregon Supreme Court Justice Roberts explained the rationale for allowing this type of expert testimony:

While jurors may be capable of personalizing the emotions of victims of physical assault generally, and of assessing witness credibility accordingly, tensions unique to the trauma experienced by a child sexually abused by a family member have remained largely unknown to the public. As the expert's testimony demonstrates the routine indicia of witness reliability—consistency, willingness to aid the prosecution, straight forward rendition of the facts—may, for good reason, be lacking. As a result jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion.

*Middleton*, 294 Or. at 440, 657 P.2d at 1222 (Roberts, J., concurring).

We agree with Justice Roberts's analysis. “Jurors, most of whom are unfamiliar with the behavioral sciences, may benefit from expert testimony” explaining behavior they might otherwise “attribute to inaccuracy or prevarication.” *Lindsey*, 149 Ariz. at 474, 720 P.2d at 75; *accord State v. Myers*, 359 N.W.2d 604, 610 (Minn.1984) (allowing expert testimony explaining “puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of [the victim's] credibility”). Such evidence may harm defendant's interests, but we cannot say it is unfairly prejudicial; it merely informs jurors that commonly held assumptions are not necessarily accurate and allows them to fairly judge credibility.

151 Ariz. at 381-82, 728 P.2d at 251-52. *Accord State v. Lujan*, 192 Ariz. 448, 451, ¶ 9, 967 P.2d 123, 126 (1998) (“*Moran* allowed the prosecution to present expert testimony on behavioral characteristics of a recanting child victim to assist the jury in evaluating the victim's motive for recanting. ... Noting that several other jurisdictions used expert testimony to explain the general behavioral characteristics of child victims, *Moran* read *Lindsey* to allow expert testimony regarding ‘emotional antecedents underlying the victim's behavior’ as long as the expert did not comment on the victim's credibility.”) (quoting *Moran*, 151 Ariz. at 382, 728 P.2d at 252); *State v. Lindsey*, 149 Ariz. 472, 473-74, 720 P.2d 73, 74-75 (1986) (“We cannot assume that the average juror is familiar with the behavioral characteristics of victims of child molesting. Knowledge of such characteristics may well aid the jury in weighing the testimony of the alleged child victim. Children who have been the victims of sexual abuse or molestation may exhibit behavioral patterns (*e.g.* recantation, conflicting versions of events, confusion or inarticulate descriptions) which jurors might attribute to inaccuracy or prevarication, but which may be merely the result of immaturity, psychological stress, societal pressures or similar factors as well as of their interaction.”); *State v. Curry*, 187 Ariz. 623, 628, 931 P.2d 1133, 1138 (App.1996) (upholding Dutton’s generalized and CSAAS-related testimony “regarding generally shared characteristics of child sexual abuse victims, explaining such phenomena as secrecy, helplessness, coping mechanisms, responses to abuse, and ‘script memory,’” as well as descriptions of “familiar patterns of disclosure by the victim to others and common techniques used by perpetrators to keep the victim from disclosing the abuse to others”); *State v. Rojas*, 177 Ariz. 454, 459, 868 P.2d 1037, 1042 (App.1993) (“The State proffered Dr. Gray's testimony only

to explain to the jury why victims of sexual abuse, especially children, are reticent in reporting abuse and have difficulty remembering the details of the abuse, such as when and how often it occurred. He did not testify as to the particular characteristics of the two victims in this case or pass judgment as to whether the victims in this case were credible. In fact, Dr. Gray never met the children or the defendant in this case nor reviewed any of the videotapes of the victims. For these reasons, the court properly admitted the expert testimony.”).

**“Indeed, the majority of states ‘permit expert testimony to explain delayed reporting, recantation, and inconsistency,’ as well as ‘to explain why some abused children are angry, why some children want to live with the person who abused them, why a victim might appear ‘emotionally flat’ following sexual assault, why a child might run away from home, and for other purposes.”** *People v. Spicola*, 947 N.E.2d 620, 635 (N.Y.2011) (quoting MYERS ON EVIDENCE IN CHILD DOMESTIC AND ELDER ABUSE CASES (2005), § 6.24, at 416–422, which collects cases and notes that Kentucky, Pennsylvania and Tennessee are the only apparent exceptions). *Accord State v. Spigarolo*, 556 A.2d 112, 122 (Conn.1989) (“[T]he overwhelming majority of courts have held that, where the defendant has sought to impeach the testimony of the minor victim based on inconsistencies, partial disclosures, or recantations relating to the alleged incidents, the state may present expert opinion evidence that such behavior by minor sexual abuse victims is common.”) (collecting cases); *Sanderson v. Commonwealth*, 291 S.W.3d 610, 619-22 (Ky.2009) (“For these reasons, most states allow CSAAS ‘rehabilitative’ testimony offered to explain the puzzling conduct of the victim in order to meet the defense’s attack on the victim’s credibility.”) (Scott, J., concurring and dissenting in part) (collecting numerous federal and state cases); *State v. Blackstead*, 878 P.2d 188, 195 (Idaho App. 1994) (upholding expert testimony explaining why children delay reporting sexual abuse); *Stout v. State*, 612 N.E.2d 1076, 1079-80 (Ind.App.1993) (upholding expert testimony that explained why a victim of sexual abuse would report the details of the incident in “bits and pieces”); *Commonwealth v. Dockham*, 542 N.E.2d 591, 597-98 (Mass.1989) (expert testimony on “general behavioral characteristics of sexually abused children” admissible); *State v. W.B.*, 17 A.3d 187, 199 (N.J.2011) (“The use of Child Sexual Abuse Accommodation Syndrome (CSAAS) expert testimony is well settled. In 1993, this Court held that expert testimony in the area of CSAAS was permissible in order to ‘explain why many sexually abused children delay reporting their abuse, and why many children recant allegations of abuse and deny that anything occurred.’”) (quoting *State v. J.Q.*, 617 A.2d 1196, 1209 (N.J. 1993)) *State v. Paul*, 769 N.W.2d 416, 419-20, ¶¶ 4-8 (N.D.2009) (upholding expert testimony on the delay in reporting sexual abuse by children and the presentation of children when they make disclosures about sexual abuse); *State v. Hall*, 946 P.2d 712, 720-21 (Utah 1997) (upholding expert testimony explaining inconsistent statements describing sexual abuse but prohibiting testimony quantifying witness truthfulness); *Sanderson v. State*, 165 P.3d 83, 90 (Wyo.2007) (“Applying the basic principles in the area of child sexual abuse, we have previously held that ‘[Child Sexual Abuse Accommodation Syndrome] evidence is relevant and admissible to dispel myths the public might hold concerning a child sexual abuse victim’s post-abuse behavior if that behavior is an issue in the case.’ ... ‘For example, if the facts of a particular case show that the victim ... recanted the allegations, ... then testimony about that particular characteristic of CSAAS would be admissible to dispel any myths the jury may hold concerning that behavior.’”) (quoting *Frenzel v. State*, 849 P.2d 741, 749 (Wyo.1993)).

2. Although some courts have expressed preference for delaying the admission of this rehabilitative evidence until the State's rebuttal case, *see State v. J.Q.*, 617 A.2d 1196, 1201 (N.J.1993), most permit the prosecution to present this evidence in its case in chief. The rationale is that the State's own evidence will relate behaviors that the jury will find incompatible with the allegations of sexual abuse, such as the victim's delayed or piecemeal disclosure or recantations. *See People v. Bowker*, 203 Cal.App.3d 385, 393-94, 249 Cal.Rptr. 886, 891-92 (1988) (use of CSAAS evidence need not await a defendant's attack on the credibility of the victim, but "at a minimum must be targeted to a specific 'myth' or 'misconception' suggested by the evidence," such as "where a child delays a significant period of time before reporting an incident or pattern of abuse," or "his story in whole or in part," in which cases expert testimony that such responses are not uncommon responses to the secretive environment created by an abuser in a position of trust or to the pressures of attempting to avoid the negative consequences of disclosure); *State v. Favoccia*, 51 A.3d 1002, 1013 n.21 (Conn.2012) ("The state need not wait until its rebuttal case to introduce the type of evidence regarding the general behavioral characteristics of minor sexual assault victims that was recognized in *Spigarolo*; it may do so in its case-in-chief 'once the victim has testified and there has been testimony introducing the alleged dates of abuse and reporting.'") (quoting *State v. Cardany*, 646 A.2d 291, 294 (Conn.App.1994), which held that "the state may introduce expert testimony that explains in general terms the tendency of minors to delay in reporting incidents of abuse once the victim has testified and there has been testimony introducing the alleged dates of abuse and reporting"); *People v. Peterson*, 537 N.W.2d 857, 868-69 (Mich.1995) ("We believe that in the present case we strike the appropriate balance by allowing an expert to testify about behavioral traits that may, by their very nature, create confusion in the minds of the jury. Because the pertinent inquiry is not the timing of the admission, but rather the reason for the use of the evidence, the admission of expert testimony is not confined to the rebuttal stage of proofs and thus may be introduced, as limited by this opinion, in the prosecution's case in chief."); *Frenzel v. State*, 849 P.2d 741, 749 (Wyo.1993) ("Qualified experts on child sexual abuse may, therefore, use evidence of CSAAS characteristics of sexually abused children for the sole purpose of explaining a victim's specific behavior which might be incorrectly construed as inconsistent with an abuse victim *or* to rebut an attack on the victim's credibility. For example, if the facts of a particular case show that the victim delayed reporting the abuse, recanted the allegations, kept the abuse secretive, or was accommodating to the abuse, then testimony about that particular characteristic of CSAAS would be admissible to dispel any myths the jury may hold concerning that behavior.") (emphasis added).

**A. In any event, the admission of this type of expert testimony before the defendant's cross-examination of the victim and other prosecution witnesses can be justified on the basis that defense counsel used his opening statement to attack the victim's credibility, based upon behaviors that are seemingly inconsistent with having been sexually abused. In many contexts, courts have held that the defendant's opening statement may open the door to the State presenting the evidence he challenges on appeal. *See United States v. Beltran-Rios*, 878 F.2d 1208, 1209-12 (9<sup>th</sup> Cir. 1989) (defense counsel's cross-examination of prosecution witnesses opened door to profile evidence); *Neal v. State*, 898 S.W.2d 440, 443 (Ark.1995) ("In view of Mr. Neal's claim, which was made in his counsel's opening statement before the jury, that he had no knowledge of the presence of the marijuana in his home, the**

evidence of the prior sales was relevant to cast grievous doubt upon his testimony.”); *State v. Hyde*, 186 Ariz. 252, 276, 921 P.2d 655, 679 (1996) (allowing admission of defendant’s debt for unpaid child support when defense counsel claimed in his opening statement that defendant had no financial motives for murder); *Commonwealth v. Munera*, 578 N.E.2d 418, 422 (Mass.App.1991) (allowing the prosecution to introduce drug courier profile evidence “to rebut the defendant’s trial strategy, which immediately became apparent in the defendant’s opening”); *Commonwealth v. Constant*, 925 A.2d 810, 819-20 (Pa.Super.2007) (justifying other-act evidence to rebut defense of accidental shooting raised during opening statement).

**B. Furthermore, Arizona and other courts have held that the State may offer rehabilitative evidence preemptively to address anticipated impeachment during cross-examination.** See *United States v. Saada*, 212 F.3d 210, 225 n.16 (3<sup>rd</sup> Cir. 2000) (truthfulness of plea agreement with cooperating witness may be admitted in anticipation of defense counsel’s impeachment); *State v. James*, 141 Ariz. 141, 146, 685 P.2d 1293, 1298 (1984) (same); *State v. McCall*, 139 Ariz. 147, 159, 677 P.2d 920, 932 (1983) (“As the prosecution would not be precluded from responding to a defense attack on a witness’ credibility, we will not prohibit it from using such questions on direct examination.”); *State v. Gentile*, 818 A.2d 88, 99 (Conn.App.2003) (“The overwhelming majority view among the circuits is that it is not improper bolstering for a prosecutor to question a witness on direct examination about the cooperation agreement’s requirement that the witness testify truthfully to receive the benefits of the agreement.”) (collecting cases).

**C. At the very worst, “even if the trial court prematurely admitted the [challenged] evidence, subsequently admitted [defense] evidence can render the error harmless.”** *Dickson v. State*, 246 S.W.3d 733, 744 (Tex.Crim.App.2008). Accord *United States v. Musaleeb*, 35 F.3d 692, 695 (2<sup>nd</sup> Cir. 1994) (premature evidence of defendant’s gun possession would have ultimately been admissible to rebut mere presence defense); *People v. Wood*, 103 Cal.App.4th 803, 809-10 (2002) (improper evidence defendant refused consent to search cured by defense evidence); *State v. Ellert*, 301 N.W.2d 320, 323 (Minn.1981) (premature impeachment of recanting victim); *State v. Bates*, 804 S.W.2d 868, 879 (Tenn.1991) (premature admission of defendant’s post-murder conduct); *Howland v. State*, 966 S.W.2d 98, 104 (Tex.Crim.App.1998) (applying principle to sexual other-act evidence). Cf. *State v. Bible*, 175 Ariz. 549, 602, 858 P.2d 1152, 1205 (1993) (prosecutor’s improper opening statement, which referred to torture of the victim, did not require reversal because it was a reasonable inference from evidence later introduced and would have been proper during closing argument).

**3. Jurisdictions that allow expert testimony to explain general behavioral characteristics of sexually victimized children, such as delayed and piecemeal disclosure and recantation, draw the line at the expert offering an opinion that the charged victim’s observed behaviors are consistent with the victim having suffered sexual abuse. Consistent**

**with Arizona law, the Connecticut Supreme Court cogently articulated this difference as follows:**

This variety of expert testimony is admissible because the consequences of the unique trauma experienced by minor victims of sexual abuse are matters beyond the understanding of the average person. *See United States v. St. Pierre*, 812 F.2d 417, 419-20 (8th Cir.1987); *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73 (1986); *State v. Carlson*, 360 N.W.2d 442, 443 (Minn.App.1985); *State v. Pettit*, 66 Or.App. 575, 579, 675 P.2d 183, *rev. denied*, 297 Or. 227, 683 P.2d 91 (1984); *State v. Harwood*, 45 Or.App. 931, 932, 609 P.2d 1312 (1980); *State v. Hicks*, *supra*. Consequently, expert testimony that minor victims typically fail to provide complete or consistent disclosures of the alleged sexual abuse is of valuable assistance to the trier in assessing the minor victim's credibility. As the Oregon Supreme Court stated: "It would be useful to the jury to know that ... many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. Explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the witness's credibility." *State v. Middleton*, *supra*, 294 Or. at 436, 657 P.2d 1215.

We disagree with the defendant's contention that Woods's testimony "usurped" the jury's function of assessing the credibility of witnesses. As noted above, Woods was not asked about the credibility of the particular victims in this case, nor did she testify as to their credibility. **The cases that have considered this issue have noted the critical distinction between admissible expert testimony on general or typical behavior patterns of minor victims and inadmissible testimony directly concerning the particular victim's credibility.** *See United States v. Azure*, *supra*, at 340 (forbidding expert testimony on the credibility of the present victim); *State v. Lindsey*, *supra* (direct expert testimony on credibility of particular child inadmissible); *Wheat v. State*, 527 A.2d 269, 275 (Del.1987) (admitting expert testimony on general character of abuse victims but prohibiting testimony on specific victim's veracity); *People v. Foreman*, *supra*, 161 Mich.App. at 24, 410 N.W.2d 289 (testimony that it is common for child sexual abuse victims to delay reporting of incidents admissible because expert did not opine on whether particular children were truthful); *State v. Hicks*, *supra*, 148 Vt. at 462, 535 A.2d 776 (testimony admissible where it concerned whether delay in reporting common but no opinion on victim's credibility); *but see State v. Kim*, 64 Haw. 598, 609, 645 P.2d 1330 (1982) (expert opinion may reveal to trier characteristics of particular witness which may assist assessment of credibility); *State v. Myers*, 359 N.W.2d 604, 609-10 (Minn.1984) (admitting expert opinion on victim's credibility); *State v. Geyman*, 729 P.2d 475, 479 (Mont.1986) (expert opinion admissible to assist jury on credibility of particular child). In *United States v. Azure*, *supra*, at 339, a case on which the defendant relies, the government offered the expert opinion of a pediatrician specializing in child abuse that the particular victim's testimony was believable. The court held that this testimony impermissibly invaded the jury's "exclusive function" of assessing the credibility of witnesses. The court observed, however, that the expert might have "aided the jurors without usurping their exclusive function by generally

testifying about ... various patterns of consistency in the stories of child sexual abuse victims....” *Id.* at 340.

We hold that, where defense counsel has sought to impeach the credibility of a complaining minor witness in a sexual abuse case, based on inconsistency, incompleteness or recantation of the victim's disclosures pertaining to the alleged incidents, the state may offer expert testimony that seeks to demonstrate or explain in general terms the behavioral characteristics of child abuse victims in disclosing alleged incidents. In the present case, Woods's testimony did not usurp the jury's function of assessing the credibility of B's and G's testimony, and was therefore admissible.

*State v. Spigarolo*, 556 A.2d 112, 123-24 (Conn.1989).

*Accord Nelson v. State*, 782 P.2d 290, 297-99 (Alaska App. 1989) (concluding that expert testimony, that victims' reports of sexual abuse were consistent with valid reports of sexual abuse, was inadmissible because it “effectively informed the jury that, in his expert opinion, [they] were telling the truth and had been abused by Nelson”); *State v. Moran*, 151 Ariz. 378, 386, 728 P.2d 246, 255 (1986) (“We hold that the trial court should not have admitted testimony that the victim's behavior was consistent with the abuse having occurred. Further, the court erred in permitting an expert to imply her belief of the daughter's veracity and in permitting the expert's ‘personal opinion’ that the daughter was telling the truth about the molestation and lying only about the extent of penetration. Such testimony was inadmissible under Rules 702 and 704.”); *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986) (“Thus, even where expert testimony on behavioral characteristics that affect credibility or accuracy of observation is allowed, experts should not be allowed to give their opinion of the accuracy, reliability or credibility of a particular witness in the case being tried. ... Nor should experts be allowed to give similar opinion testimony, such as their belief of guilt or innocence. The law does not permit expert testimony on how the jury should decide the case.”); *State v. Tucker*, 165 Ariz. 340, 346, 798 P.2d 1349, 1355 (App.1990) (“To summarize then, an expert witness may testify about the general characteristics and behavior of sex offenders and victims if the information imparted is not likely to be within the knowledge of most lay persons. The expert may neither quantify nor express an opinion about the veracity of a particular witness or type of witness. The expert may not explain that, based upon the characteristics and behavior he has described, a person's conduct is consistent or inconsistent with the crime having occurred.”); *People v. Bowker*, 203 Cal.App.3d 385, 393, 249 Cal.Rptr. 886, 891 (1988) (“Fundamentally, *Bledsoe* must be read to reject the use of CSAAS evidence as a predictor of child abuse. It is one thing to say that child abuse victims often exhibit a certain characteristic or that a particular behavior is not inconsistent with a child having been molested. It is quite another to conclude that where a child meets certain criteria, we can predict with a reasonable degree of certainty that he or she has been abused. The former may be appropriate in some circumstances; the latter clearly is not.”); *State v. Foret*, 628 So.2d 1116, 1130 (La.1993) (“In the instant case, the expert testified as to his expert opinion on the victim's credibility, and did not limit his testimony to general information about possible psychiatric explanations for the delay in reporting. In fact, the expert based most of his opinion upon the ‘level of detail’ of the child's description of the sexual abuse. He concluded with an objected-to summation that, in his expert opinion, the witness was telling

the truth on that occasion as to whether abuse had occurred. This expert assessment of the witness' credibility was improper, making the trial court's overruling of the objection erroneous.”); *State v. W.B.*, 17 A.3d 187, 200 (N.J.2011) (“Simply stated, CSAAS cannot be used as probative testimony of the existence of sexual abuse in a particular case. ... Therefore, introduction of such testimony will be upheld so long as the expert does not attempt to ‘connect the dots’ between the particular child's behavior and the syndrome, or opine whether the particular child was abused.”); *State v. Schnabel*, 952 A.2d 452, 462 (N.J.2008) (“Our review of the record satisfies us that there was no error in the expert's CSAAS testimony. The State offered the CSAAS testimony for the purpose of rebutting the inference that the girls were lying because they did not immediately disclose the abuse. Dr. D'Urso was qualified as an expert. He explained that CSAAS was not a diagnostic device, but rather comprised behavioral sequences typically exhibited by abused children. He outlined those sequences. Although it was possible for the jury to draw parallels between Dr. D'Urso's CSAAS testimony and each girl's testimony, his testimony was general in nature and did not imply an opinion as to whether the girls were abused.”).

**4. Closing arguments.** Although the State's expert regarding the behavioral characteristics of perpetrators and victims of sex crimes may not comment on witness veracity or offer an opinion regarding the veracity of the victim's allegation of sexual abuse, this prohibition does not bar the prosecution from relying upon the expert's generalized testimony during closing argument to characterize the defendant's denials as false and paint the victim worthy of the jury's belief. *See State v. Loney*, 230 Ariz. 542, 544-45, ¶¶ 8-13, 287 P.3d 836, 838-39 (App.2012) (prosecutor properly relied upon expert's generalized testimony regarding the techniques used by sexual predators, including grooming, ridicule, and threats, to rebut defense counsel's closing remarks attacking the victim's credibility and her conduct with the defendant); *People v. Peterson*, 537 N.W.2d 857, 868 (Mich.1995) (“We hold that the prosecution may present evidence, if relevant and helpful, to generally explain the common post-incident behavior of children who are victims of sexual abuse. ... The prosecution may, in commenting on the evidence adduced at trial, argue the reasonable inferences drawn from the expert's testimony and compare the expert testimony to the facts of the case.”). This precedent comports with cases holding that the prosecutor may rely upon trial evidence to argue that:

**(1) the defendant lied or testified untruthfully**, *see United States v. Delgado*, 672 F.3d 320, 336 (5<sup>th</sup> Cir. 2012) (“The remark that Delgado had lied was a straightforward comment on the evidence, not an improper assertion of the prosecutor's personal opinion. The evidence showed that Delgado must have had the keys—the natural corollary being that she must have been lying to the federal agents about her access to the cab.”); *United States v. Moreland*, 622 F.3d 1147, 1161-62 (9<sup>th</sup> Cir. 2010) (“Similarly, the prosecutor's statements in this case were reasonable based on the evidence, which the prosecutor demonstrated by carefully walking the jury through the evidence and pointing out inconsistencies.”); *United States v. Bentley*, 561 F.3d 803, 813 (8<sup>th</sup> Cir. 2009) (“It is permissible for a prosecutor to interpret the evidence as indicating that the defendant is not telling the truth.”); *State v. Amaya-Ruiz*, 166 Ariz. 152, 171, 800 P.2d 1260, 1279 (1990) (evidence that defendant viewed pornography before crime justified argument

defendant falsely denied intent to rape victim); *State v. Schrock*, 149 Ariz. 433, 438-39, 719 P.2d 1049, 1054-55 (1986) (holding prosecutor may argue defendant lied when record supported assertion); and

(2) **the victim's testimony was credible**, see *Bass v. United States*, 655 F.3d 758, 760-61 (8<sup>th</sup> Cir. 2011) (collecting cases); *State v. Palmer*, 219 Ariz. 451, 453, ¶¶ 5-6, 199 P.3d 706 (App.2008) (closing argument that plea agreement's withdrawal provision rendered cooperating accomplice's testimony credible was not improper prosecutorial vouching); *State v. Lewis*, 233 P.3d 891, 896-97, ¶ 25 (Wash.App.2010) (prosecutor recited evidence supporting his assertion that the victim's testimony had a "badge of truth" and "rang out clearly with truth in it").

### **Testimony regarding credibility of specific victims or general classes**

With increasing frequency, some experts in Arizona cases have given the following problematic testimony: (1) malicious/false disclosure typically occurs in one of two scenarios—one of the child's parents prompts a false allegation during divorce or separation, or the child is an adolescent girl falsely accuses the household's male figurehead in an attempt to procure greater freedom or different living arrangements; and (2) false allegations of child molestation or abuse are "rare." Such testimony is inadmissible.

**1. "Arizona prohibits lay and expert testimony concerning the veracity of a statement by another witness,"** *State v. Boggs*, 218 Ariz. 325, 335, ¶ 39, 185 P.3d 111, 121 (2008), because opinion "testimony about the truthfulness or credibility of other witnesses invades the province of the jury," *State v. Martinez*, 230 Ariz. 382, 385, ¶ 11, 284 P.3d 893, 896 (App.2012), and such testimony is "nothing more than advice to jurors on how to decide the case." *State v. Moran*, 151 Ariz. 378, 383, 728 P.2d 248, 253 (1986). *Accord State v. Reimer*, 189 Ariz. 239, 241, 941 P.2d 912, 914 (App.1997).

**2. Testimony that false allegations are rare among children who claim to be victims of sexual abuse runs afoul of the prohibition of testimony regarding the credibility of certain classes of witness.** See *Nelson v. State*, 782 P.2d 290, 297-99 (Alaska App.1989) (concluding that expert testimony, that victims' reports of sexual abuse were consistent with valid reports of sexual abuse, was inadmissible because it "effectively informed the jury that, in his expert opinion, [they] were telling the truth and had been abused by Nelson"); *State v. Moran*, 151 Ariz. 378, 382, 728 P.2d 248, 252 (1986) ("Nor may the expert's opinion as to credibility be adduced indirectly by allowing the expert to quantify the percentage of victims who are truthful in their initial reports despite subsequent recantation.") (citing *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986), for the proposition that it is "improper to admit expert testimony that children rarely lie about sexual abuse"); *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986) ("If those words were not clear enough, we explicitly state at this time that trial courts should not admit direct expert testimony that quantifies the probabilities of the credibility of another witness. ... Thus, even where expert testimony on behavioral characteristics that affect credibility or accuracy of observation is allowed, experts should not be allowed to give their opinion of the accuracy, reliability or credibility of a particular witness in

the case being tried. Nor should such experts be allowed to give opinions with respect to the accuracy, reliability or truthfulness of witnesses of the type under consideration.”); *State v. Rojas*, 177 Ariz. 454, 459, 868 P.2d 1037, 1042 (App.1993) (“Nevertheless, the supreme court does not allow testimony as to the expert's ‘opinion of the accuracy, reliability or credibility of a particular witness in the case being tried,’ or as to a witness similar to the one involved in the current case.”) (quoting *Lindsey*, 149 Ariz. 475, 720 P.2d at 76); *State v. Tucker*, 165 Ariz. 340, 346, 798 P.2d 1349, 1355 (App.1990) (“The expert may neither quantify nor express an opinion about the veracity of a particular witness or type of witness.”); *Wheat v. State*, 527 A.2d 269, 273-74 (Del.1987) (expert may testify in order to address issues of delayed reporting or recantation but cannot testify regarding victim's credibility in terms of statistical probabilities); *People v. Peterson*, 537 N.W.2d 857, 868 (Mich.1995) (expert testimony that child sex-crime victims have a veracity rate of 85% is improper); *State v. W.B.*, 17 A.3d 187, 202 (N.J.2011) (“Dr. Coco's testimony included an assertion that only 5–10% of children exhibiting CSAAS symptoms lie about sexual abuse. Such testimony creates an inference that D.L. told the truth in her original accusation, despite her motives to fabricate the allegations, and notwithstanding her trial testimony recanting them. Certainly, that is not the purpose of CSAAS testimony or the reason for its admission. Even Dr. Coco so acknowledged. Accordingly, we hold that expert testimony about the statistical credibility of victim-witnesses is inadmissible. Statistical information quantifying the number or percentage of abuse victims who lie deprives the jury of its right and duty to decide the question of credibility of the victim based on evidence relating to the particular victim and the particular facts of the case.”).

### **Profile testimony**

**1. Courts generally prohibit expert testimony that describes the characteristics of known perpetrators and victims of sex crimes against children, directly compares the defendant and victim in the instant case against this collection of characteristics, and then expresses an opinion about whether the conduct of the alleged victim or defendant is consistent with the commission of the charged offense.**

**2. The concept of “profile evidence” applies with equal force to victims and defendants in sex-crime cases. The Tenth Circuit Court of Appeals collected the following recognized definitions of “profile evidence,” all of which refer to a compilation of characteristics an expert believes to be common among persons belonging to a certain subset of individuals:**

What is “profile evidence”? Courts define it in varying terms such as an “informal compilation of characteristics often displayed by those trafficking in drugs” [citation omitted]; “an ‘abstract of characteristics found to be typical of persons transporting illegal drugs’” [citation omitted]; and “the collective or distilled experience of narcotics officers concerning characteristics repeatedly seen in drug smugglers” [citation omitted]. A profile is simply an investigative technique. It is nothing more than a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity.

*United States v. McDonald*, 933 F.2d 1519, 1521 (10<sup>th</sup> Cir. 1991) (quoting *United States v. Campbell*, 843 F.2d 1089, 1091 n.3 (8<sup>th</sup> Cir. 1988); *United States v. Oyekan*, 786 F.2d 832, 834 n.2 (8<sup>th</sup> Cir. 1986); and *Florida v. Royer*, 460 U.S. 491, 525 n.6 (1983) (Rehnquist, J., dissenting). See also *United States v. Cordoba*, 104 F.3d 225, 229 (9<sup>th</sup> Cir. 1997) (“A drug courier profile is a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics, commonly used by agents as a basis for reasonable suspicion to stop and question a suspect.”); *State v. Lee*, 191 Ariz. 542, 544, ¶ 10, 959 P.2d 799, 801 (1998) (“Courts commonly describe drug courier profiles as an ‘informal compilation of characteristics’ or an ‘abstract of characteristics’ typically displayed by persons trafficking in illegal drugs.”); *State v. Gonzalez*, 229 Ariz. 550, 553, ¶ 11, 278 P.3d 328, 331 (App.2012) (same); *People v. Ramirez*, 1 P.3d 223, 227 (Colo.App.1999) (“A drug courier profile is an informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics.”); *State v. Stovall*, 788 A.2d 746, 754 (N.J.2002) (“A ‘drug courier profile’ is merely a shorthand way of referring to a group of characteristics that may indicate that a person is a drug courier.”); *State v. Avendano-Lopez*, 904 P.2d 324, 327 (Wash.App.1995) (“‘Profile’ testimony identifies a group as more likely to commit a crime and is generally inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice.”); *Ryan v. State*, 988 P.2d 46, 55 (Wyo.1999) (“Finding guilt by reference to common characteristics of a class of individuals to which one belongs raises the specter of profile evidence. Profile or syndrome evidence is developed through expert testimony and tends to classify people by their shared physical, emotional, or mental characteristics.”).

**3. The Arizona Supreme Court has indicated that profile evidence may be admitted in certain limited situations. “Generally, such profile evidence is offered in the context of suppression and probable cause hearings, where law enforcement’s justification for a stop, arrest, or confiscation is at issue.”** *State v. Lee*, 191 Ariz. 542, 545, ¶ 11, 959 P.2d 799, 802 (1998) (citing *Florida v. Royer*, 460 U.S. 491, 502 (1983)). *Accord United States v. Quigley*, 890 F.2d 1019, 1021–22 (8<sup>th</sup> Cir. 1989) (collecting cases)). Additionally, such evidence may be admitted at trial for other purposes, including: (a) as background for a police stop and search; (b) as foundation for expert opinions; (c) to explain a method of operation; and (d) as rebuttal evidence. See *Lee*, 191 Ariz. at 545, ¶ 11, 959 P.2d at 802 (collecting cases).

**4. “Notwithstanding these exceptions, a significant majority of jurisdictions have condemned the use of ... profile evidence as substantive proof of guilt.”** *State v. Lee*, 191 Ariz. 542, 545 ¶ 12, 959 P.2d 799, 802 (1998) (citing *State v. Walker*, 181 Ariz. 475, 481, 891 P.2d 942, 948 (App.1995)). Prevailing precedent demonstrates that the prosecution impermissibly uses a profile as substantive evidence of guilt through testimony establishing the existence of a common profile for a certain class of persons, listing the profile’s component characteristics for the jury, and comparing the profile’s characteristics directly against those exhibited by the defendant on trial or the alleged victim. For example, the Fifth Circuit Court of Appeals observed:

In addition to the plain language of the record, the case law demonstrates that the profile evidence was admitted as substantive evidence of guilt. During Officer Hughes’s testimony, *he described the profile itself and then proceeded to*

*list the characteristics of the profile that Williams displayed.* Other circuits have held that testimony expressly comparing an individual defendant's actions to a drug profile constitutes substantive evidence of guilt. *See United States v. Quigley*, 890 F.2d 1019 (8<sup>th</sup> Cir. 1989) (“This point by point examination of profile characteristics with specific reference to [the defendant] constitutes use of the profile not as background to explain or justify an investigative stop, but as substantive evidence that [the defendant] fits the profile and, therefore, must have intended to distribute the cocaine in his possession.”), *cert. denied*, 493 U.S. 1091, 110 S.Ct. 1163, 107 L.Ed.2d 1066 (1990); *United States v. Lui*, 941 F.2d 844, 847 (9<sup>th</sup> Cir. 1991) (“As in *Quigley*, here [the DEA agent] tied [the defendant’s] actions to a drug courier profile for the purpose of proving [the defendant’s] guilt.”).

*United States v. Williams*, 957 F.2d 1238, 1241 (5<sup>th</sup> Cir. 1992) (emphasis added). *See also United States v. Vasquez*, 213 F.3d 425, 427 (8<sup>th</sup> Cir. 1999) (rejecting contention that officer’s expert testimony was “prejudicial courier profile testimony” because “the testimony was not admitted to establish [defendant’s] guilt by showing he fit the characteristics of a courier profile”); *United States v. Buchanan*, 70 F.3d 818, 833 n.19 (5<sup>th</sup> Cir. 1995) (“We also reject Bonner’s argument that this testimony was impermissible ‘profile evidence’ [because] the government did not seek to prove guilt by showing how a defendant fit a list of characteristics making up the ‘profile’ of a drug courier.”); *United States v. McChristian*, 46 F.3d 1499, 1505 (9<sup>th</sup> Cir. 1995) (rejecting “profile evidence” claim, where expert “did not mention drug courier profiles,” and was not “asked whether drug addiction is a characteristic of a drug courier profile”); *United States v. Robinson*, 978 F.2d 1554, 1563 (10<sup>th</sup> Cir. 1992) (“Courts have declared testimony concerning the alignment with a particular profile incompetent as direct evidence of guilt.”); *United States v. Jones*, 913 F.2d 174, 178 (4<sup>th</sup> Cir. 1990) (“The use of expert testimony as substantive evidence showing that the defendant fits the profile and therefore must have intended to distribute the cocaine in his possession’ is error.”); *United States v. Quigley*, 890 F.2d 1019, 1020-21 (8<sup>th</sup> Cir. 1989) (“In addition, Moss testified to the specific characteristics used by airport security officers to spot possible couriers. ... In a similar manner, the prosecutor led Moss through many characteristics of the drug courier profile, making specific references en route to the evidence against Quigley.”); *United States v. Hernandez-Cuartas*, 717 F.2d 552, 554 & n.1 (11<sup>th</sup> Cir. 1983) (holding that government sought to use drug courier profile as substantive evidence by establishing its existence and asking the witness, a customs agent, to opine whether the accused fit the profile, but holding that prosecution properly questioned customs agent about reasons for assigning the defendant to a secondary inspection site because “neither questions nor answers along this line touched upon the existence *vel non* of a ‘profile’”); *L.C.H. v. T.S.*, 28 P.3d 915, 924-25 (Alaska 2001) (“In *Russell v. State*, the court of appeals noted that a party may not offer ‘evidence that there is a psychological “profile” characteristic of sexual abuse or sexual assault victims to prove that the victim in a particular case fits this profile, and thus that the victim must be telling the truth when he or she claims to have been abused or assaulted.’”) (quoting *Russell v. State*, 934 P.2d 1335, 1343 (Alaska App. 1997)); *State v. Lee*, 191 Ariz. 542, 545-46, ¶¶ 14-18, 959 P.2d 799, 802-03 (1998) (after the arresting officer established the existence of a “drug courier profile,” both the prosecution and the defense attempted to compare its characteristics against the accused); *State v. Cifuentes*, 171 Ariz. 257, 830 P.2d 469 (App.1991) (“Because defendant was Guatemalan and his possession of the Isuzu matched the profile developed by

Tolan from 15 to 20 cases, the jury was invited to infer that defendant knew his Isuzu was stolen because it was part of a Guatemalan car theft ring.”); *State v. Percy*, 507 A.2d 955, 960 (Vt.1986) (“Profile or syndrome evidence is evidence elicited from an expert that a person is a member of a class of persons who share a common physical, emotional, or mental condition. See generally 1 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE § 401[10], at 88-91 (1985). The expert witness is typically asked to describe the general phenomena and characteristics of the condition at issue, and to give his opinion that the person is suffering from such condition.”).

**5. Some courts have characterized Child Sexual Abuse Accommodation Syndrome (CSAAS) as a profile that prosecutors should *not* use to identify victims of sexual abuse by correlating the charged victim’s behavioral characteristics against the collection of traits found in sexually abused children.** *See, e.g., L.C.H. v. T.S.*, 28 P.3d 915, 923-24 (Alaska 2001) (“The profile of a sexually abused child was first proposed by Dr. Roland Summit in 1983 as Child Sexual Abuse Accommodation Syndrome (CSAAS). The CSAAS model was designed to aid in treatment of children already known to have been abused, not to diagnose abuse. Thus profile testimony is not to be used to prove that abuse has occurred.”) (footnotes omitted); *W.R.C. v. State*, 69 So.3d 933, 937-38 (Ala.Crim.App.2010) (“CSAAS is essentially a ‘profile’ of child sexual-abuse victims that contains a list of characteristics and behaviors that are allegedly “typical” of such victims, such as (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; and (5) retraction.”) (citing ELIZABETH TRAINOR, ANNOTATION, ADMISSIBILITY OF EXPERT TESTIMONY ON CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME (CSAAS) IN CRIMINAL CASES, 85 A.L.R.5th 595 (2001)).

**6. The prohibition against using profile evidence testimony means that the State may not have its expert testify that the typical sexually abused child possesses a certain constellation of characteristics, list these traits for the jury, compare the charged victim against this set of traits, and thereafter conclude that the victim had in fact been sexually abused.** *See Russell v. State*, 934 P.2d 1335, 1343 (Alaska App. 1997) (“*Cox* [v. *State*, 805 P.2d 374, 377-79 (Alaska App. 1991)] and *Haakanson* [v. *State*, 760 P.2d 1030, 1036 (Alaska App. 1988)] prohibit the State from introducing evidence that there is a psychological ‘profile’ characteristic of sexual abuse or sexual assault victims to prove that the victim in a particular case fits this profile, and thus that the victim must be telling the truth when he or she claims to have been abused or assaulted.”); *State v. Tucker*, 165 Ariz. 340, 346, 798 P.2d 1349, 1355 (App. 1990) (“The expert may not explain that, based upon the characteristics and behavior he has described, a person’s conduct is consistent or inconsistent with the crime having occurred. With these principles in mind, we turn to the evidence in the case before us. We find that the testimony of the state’s expert witness, Dr. Jeffrey Harrison, a psychologist, violated the principles set out above in three ways. ... Second, Dr. Harrison was allowed to relate general characteristics of molesters and their victims to the specific facts of this case.”); *State v. Chamberlain*, 628 A.2d 704, 707 (N.H.1993) (“In the present case, the testimony of Ramona Belanger was largely based on the child sexual abuse accommodation syndrome. She identified several characteristics, such as secrecy, helplessness, accommodation, and incomplete disclosure, that are part of the syndrome. The purpose of her testimony, however, was not to educate the jury about the characteristics and offer an explanation for some of the child victim’s behaviors. The purpose of

her testimony was to prove that the child victim had been abused by showing that she exhibited behaviors and characteristics identical to those identified by the child sexual abuse accommodation syndrome. Belanger concluded her testimony for the State by confirming that the behaviors of the child victim were consistent with those of a child who had been sexually abused.”).

**7. One of the most common justifications for prohibiting the use of any kind of profile evidence as substantive evidence of the defendant’s guilt is that such evidence constitutes “group character evidence” prohibited by Arizona Rules of Evidence 403 and 404(a) and consequently “creates too high a risk that a defendant will be convicted not for what he did but for what others are doing.”** *State v. Cifuentes*, 171 Ariz. 257, 258, 830 P.2d 469, 470 (App.1991) (collecting cases); *Haakanson v. State*, 760 P.2d 1030, 1036 (Alaska App. 1988) *State v. Gonzalez*, 229 Ariz. 550, 553, ¶ 12, 278 P.3d 328, 331 (App.2012) (noting that “such evidence is unduly prejudicial because it impermissibly suggests to the jury that “because someone shares characteristics—many of them innocent and commonplace—with a certain type of offender, that individual must also” be guilty”) (quoting *State v. Lee*, 191 Ariz. 542, 545, 959 P.2d 799, 802 (1998)); *State v. Walker*, 181 Ariz. 475, 481, 891 P.2d 942, 948 (App.1995) (“Although Arizona appellate courts have not directly considered the admissibility of drug courier profiles, in *State v. Cifuentes*, 171 Ariz. 257, 257, 830 P.2d 469, 469 (App.1991), we condemned the admission of car theft profile evidence. We concluded that the ‘use of profile evidence to indicate guilt ... creates too high a risk that a defendant will be convicted not for what he did but for what others are doing.’”); *State v. Favoccia*, 51 A.3d 1002, 1019 (Conn.2012) (“Other courts have aptly observed that testimony linking a specific complainant to the general behavioral characteristics of sexual assault victims poses the risk of the jury improperly using those behaviors offensively as substantive proof that the complainant was sexually assaulted, rather than properly to respond defensively to impeachment by explaining behaviors that might otherwise impact her credibility[.]”) (collecting cases); *id.* at 1023 (“[T]here is no material distinction between express testimony that the child has been sexually abused, and implicit testimony that outlines the unreliable behavioral reactions found with sexually abused victims, followed by a list of the complainant’s own behavioral reactions, that points out that the two are consistent, and then invites the jury to add up the points to conclude that the child has been sexually abused.”); *Steward v. State*, 652 N.E.2d 490, 499 (Ind.1995) (“Where a jury is confronted with evidence of an alleged child victim’s behaviors, paired with expert testimony concerning similar syndrome behaviors, the invited inference—that the child was sexually abused because he or she fits the syndrome profile—will be as potentially misleading and equally as unreliable as expert testimony applying the syndrome to the facts of the case and stating outright the conclusion that a given child was abused.”). **This rationale, however, is not the sole basis for the prohibition against offering profile evidence in child sex-crime cases as substantive proof of the defendant’s guilt.**

**8. The other justification for precluding CSAAS profile evidence as substantive evidence of guilt is that Dr. Summit did not intend that this “syndrome” would be used to diagnose—that is, *identify*—sexually abused children or deduce the commission of sexual abuse from overt behavior. Rather, CSAAS assumes that the particular child at issue had been abused and endeavors to facilitate treatment of these persons by identifying the wide**

**range of behaviors reportedly found among members of this sub-category of sexually victimized persons:**

There has not been a showing in the record in this case, nor seemingly in other scientific literature or decisional law, of a general acceptance that would allow the use of CSAAS testimony to establish guilt or innocence. SEE DAVID MCCORD, EXPERT PSYCHOLOGICAL TESTIMONY ABOUT CHILD COMPLAINANTS IN SEXUAL ABUSE PROSECUTIONS: A FORAY INTO THE ADMISSIBILITY OF NOVEL PSYCHOLOGICAL EVIDENCE, 77 J.CRIM.L. & CRIMINOLOGY 1, 24, 38 (1986). Such use of CSAAS evidence would present the analog to *State v. Cavallo, supra*, 88 N.J. 508, 443 A.2d 1020, and would require a study of the reliability of psychiatric or psychological testimony on the likelihood that the traits found in the victim will establish that another had engaged in the conduct that had caused the symptoms. It strikes us that the premise would be strained, at least on the basis of the Summit studies. As Myers noted:

Summit did not intend the accommodation syndrome as a diagnostic device. The syndrome does not detect sexual abuse. Rather, it assumes the presence of abuse, and explains the child's reactions to it. Thus, child sexual abuse accommodation syndrome is not the sexual abuse analogue of battered child syndrome, which is diagnostic of physical abuse. With battered child syndrome, one reasons from type of injury to cause of injury. Thus, battered child syndrome is probative of physical abuse. With child sexual abuse accommodation syndrome, by contrast, one reasons from presence of sexual abuse to reactions to sexual abuse. Thus, the accommodation syndrome is not probative of abuse.

Unfortunately, a number of mental health professionals, lawyers, and commentators drew unwarranted comparisons between battered child syndrome and child sexual abuse accommodation syndrome. This error led to considerable confusion. First, some professionals misinterpreted Summit's article, believing Summit had discovered a "syndrome" that could diagnose sexual abuse. This mistake is understandable, if not forgivable. Mental health and legal professionals working in the child abuse area had long been accustomed to thinking in terms of syndrome evidence to prove physical abuse. Battered child syndrome was an accepted diagnosis by the time Summit's accommodation syndrome came along in 1983. It was natural for professionals to transfer their understanding of battered child syndrome to this new syndrome, and to conclude that the accommodation syndrome, like battered child syndrome, could be used to detect abuse.

...

[T]he accommodation syndrome was being asked to perform a task it could not accomplish.

The accommodation syndrome has a place in the courtroom. The syndrome helps explain why many sexually abused children delay reporting their abuse, and why many children recant allegations of abuse and deny that anything

occurred. If use of the syndrome is confined to these rehabilitative functions, the confusion clears, and the accommodation syndrome serves a useful forensic function. [MYERS, *supra*, 68 Neb.L.Rev. at 67–68 (footnotes omitted).]

This we believe is the most concise summary of the proper use of CSAAS and will serve as a useful road map in the trial of such cases. Another commentator agrees.

Much of the legal controversy about CSAAS is a product of legal misuse and misunderstanding which is a direct result of the fact that CSAAS is a misnomer. The term “syndrome” may refer to two different things. In laymen’s terms it is defined as either “a group of signs and symptoms that occur together and characterize a particular abnormality” or “a set of concurrent things (as emotions or actions) that usu[ally] form an identifiable pattern.” Medically, however, the term refers to the aggregation of symptoms associated with a morbid process which forms a disease. CSAAS, as it is currently defined, is neither a disease nor a pattern of abnormality.

...

[T]he syndrome seeks to define a coping process and not behavior that will identify the existence of sexual abuse.

... Since this “syndrome” is only a piece of the child sexual abuse machinery, testimony concerning CSAAS may only be offered for the purpose for which it was defined—to explain the child’s irrational behavior. [CHANDRA LORRAINE HOLMES, CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME: CURING THE EFFECTS OF A MISDIAGNOSIS IN THE LAW OF EVIDENCE, 25 Tulsa L.J. 143, 157-59 (1989) (footnotes omitted).]

The California Court of Appeals has thus refused to admit testimony about the general characteristics of molested children for the purpose of allowing the jury to conclude that a particular child is a victim of abuse. *People v. Bowker*, *supra*, 203 Cal.App.3d 385, 249 Cal.Rptr. 886. Instead, because CSAAS has a limited, therapeutic purpose and not a predictive one, “the evidence must be tailored to the purpose for which it is being received.” *Id.* at 891, 203 Cal.App.3d 385. “[A]t a minimum the evidence must be targeted to a specific ‘myth’ or ‘misconception’ suggested by the evidence” and limited to explaining why “the victim’s reactions as demonstrated by the evidence are not inconsistent with having been molested.” *Id.* at 891–92, 203 Cal.App.3d 385. The court must also explain to the jury that the expert’s testimony is not intended to address the ultimate question of whether the victim’s molestation claims are true and must admonish the jury not to use the testimony for that purpose. *Id.* at 892, 203 Cal.App.3d 385. That use of CSAAS testimony is consistent with the use to which we put the battered-woman-syndrome evidence in *Kelly*, *supra*, 97 N.J. 178, 478 A.2d 364.

Other jurisdictions follow that approach. *See State v. Reser*, 244 Kan. 306, 767 P.2d 1277, 1283 (1989) (qualifying clinical specialist with training in child sexual abuse to testify to “common patterns of behavior” resulting from abuse and that this victim had symptoms consistent with those patterns); *People v. Beckley*, 434 Mich. 691, 456 N.W.2d 391, 407 (1990) (finding appropriate expert testimony limited to providing jury with background information, relevant to specific aspect of child's conduct at issue, which it could not otherwise bring to its evaluation of child's credibility); *State v. Middleton*, 294 Or. 427, 657 P.2d 1215, 1220 (1983) (explaining “superficially bizarre behavior” of victims of abuse helps jury to assess credibility). *But see State v. Bachman*, 446 N.W.2d 271, 276 (S.D.1989) (allowing opinion testimony that victim's allegations were truthful).

*State v. J.Q.*, 617 A.2d 1196, 1209-10 (N.J.1993). *Accord Steward v. State*, 652 N.E.2d 490, 492-94 (Ind.1995); *State v. Foret*, 628 So.2d 1116, 1123-25 (La.1993); *State v. W.B.*, 17 A.3d 187, 199-200 (N.J.2011); *State v. Gokey*, 574 A.2d 766, 768-70 (Vt.1990).

**9. Because of the diagnostic purpose of CSAAS’s conception, courts have doubted whether a profile for sexually abused children even exists, given the lack of agreement among behavioral scientists about which symptoms indicate whether a certain child has been sexually abused:**

Our first concern is that the evaluations of the children deal almost exclusively in vague psychological profiles and symptoms, and unquantifiable evaluation results. There is much criticism attacking the attempts to compile a list of symptoms and behaviors to serve as an accurate indicator of whether a child has been sexually abused. *See Commonwealth v. Dunkle*, 529 Pa. 168, 602 A.2d 830, 832–36 (1992) (citing articles); *State v. J.Q.*, 252 N.J.Super. 11, 33–35, 599 A.2d 172, 184–85 (1991) (citing articles), *aff’d*, 130 N.J. 554, 617 A.2d 1196 (1993); *State v. Rimmasch*, 775 P.2d 388, 401–02 (Utah 1989) (citing articles); see also MYERS ET AL., EXPERT TESTIMONY IN CHILD SEXUAL ABUSE LITIGATION, 68 NEB.L.REV. 1, 67–68 (1989). **“The consensus among scholars is that there are as yet no scientifically reliable indicators of child sexual abuse.”** *State v. J.Q.*, 252 N.J.Super. at 33, 599 A.2d at 184. **There are no symptoms or behaviors that occur in every case of child abuse, nor are there symptoms or behaviors that are found exclusively in child abuse cases. See Myers, supra at 62. The symptoms cited by Dr. Bollerud in this case are far from establishing a clear profile by which an abused child can be accurately identified.** Many of the symptoms considered to be indicators of sexual abuse, such as nightmares, forgetfulness, and overeating, could just as easily be the result of some other problem, or simply may be appearing in the natural course of the children's development.

*State v. Cressey*, 628 A.2d 696, 700 (N.H.1993) (emphasis added). *Accord Steward v. State*, 652 N.E.2d 490, 493 (Ind.1995) (“Because children's responses to sexual abuse vary widely, and because many of the characteristics identified by CSAAS, or by similar victim behavior

groupings, may result from causes unrelated to abuse, diagnostic use of syndrome evidence in courtrooms poses serious accuracy problems.”); *People v. Beckley*, 456 N.W.2d 391, 405 (Mich.1990) (“Admitting evidence that a syndrome exists can be prejudicial to a defendant because the experts are in general agreement that there is no single specific set of characteristics that can be attributed to every individual in diagnosing child sexual abuse. Within the group of sexually abused children there is a significant variation among the factors that can be observed and diagnosed.”); *State v. Gokey*, 574 A.2d 766, 768 (Vt.1990) (“No comparison testing was done with children who were not victims of sexual abuse to determine whether they also demonstrated like indicators. The expert's testimony demonstrates no scientific basis for determining that a causal relationship exists between sexual abuse and the “clinical features of sexual abuse,” nor is there demonstrated even a positive correlation between the two. In the absence of any demonstration of scientific reliability, we reject the testimony of the mental health expert identifying [the complainant child] as a victim of child sexual abuse.”) (quoting *State v. Black*, 537 A.2d 1154, 1157 (Me.1988)); *Frenzel v. State*, 849 P.2d 741, 747-48 (Wyo.1993) (“CSAAS testimony is restricted because it offers no help to the jury of proof that abuse occurred. There is general agreement on the notion that CSAAS is unreliable for determining whether abuse actually occurred. ... The evidence is unreliable because there is considerable controversy and dispute over the inclusive traits. The list of symptoms associated with child sexual abuse includes behaviors which might also be manifest in a child who was not sexually abused but has been subject to some other childhood stress.”).

**N.B. Significantly, the door swings both ways. There exists no known, verifiable profile for child molesters. See *People v. McAlpin*, 812 P.2d 563, 570-72 (Cal.1992). Courts have precluded defendants from offering evidence that they do not fit the profile of the typical pedophile and/or sex offender for the same reason: behavioral scientists have not reached any consensus about the personal characteristics or traits that identify a defendant as a pedophile or a person with normal sexual interests. See *State v. Floray*, 715 A.2d 855, 859 (Del.1997) (citing JOHN E.B. BYERS, ET AL., EXPERT TESTIMONY IN CHILD SEXUAL ABUSE LITIGATION, 68 NEB.L.REV. 1, 143-44 (1989), which opined that although some decisions have allowed a defendant to offer profile testimony as character evidence, this theory of proof is “defective” because “[t]he relevant scientific literature does not support the conclusion that there is a reliable profile of a ‘typical’ sex offender”); *State v. Parkinson*, 909 P.2d 647, 653 (Idaho App. 1995) (“Mr. Welsh acknowledged that the F.B.I. sex offender profile which he utilized was developed for use by law enforcement officials and that its application was more of an art than a science. He did not identify the components of the profile or explain how it was developed, other than noting that its development involved interviews with convicted sex offenders. Mr. Welsh did not state whether or how the resulting profile had been tested for accuracy or identify the technique's error rate.”); *State v. Michaels*, 625 A.2d 489, 509-10 (N.J.App.1993) (“The scientific and medical community have not recognized that psychiatrists were able to reliably determine the characteristics of sexual offenders, be they rapists as in *Cavallo*, or in this case, child abusers. Further, it was not demonstrated that such particular characteristics were even readily identifiable. The trial judge properly assessed the proffered expert opinion**

character testimony and correctly concluded that it was not based on reasonably reliable scientific premises.”).

**Additionally, consistent with precedent precluding use of CSAAS profile evidence on the basis that Dr. Summit formulated this syndrome to treat and not identify sexually abused children, courts have precluded psychological test results showing that a defendant has normal sexual interests when the personality tests have not been shown to detect whether the defendant committed sexual crimes against children. See *Vrocher v. State*, 813 So.2d 799, 805-06 (Ala.Crim.App.2001) (upholding preclusion of defense mental health professional “informed the trial court that although he could testify to the results of the personality tests he had administered to the appellant [and state that his personality characteristics were not typical of a pedophile], he could not state with a reasonable degree of scientific certainty or a reasonable degree of medical certainty that there was a nexus between the appellant's personality profile and his behavior on June 30, 1998, the date of the incident of sexual abuse”); *State v. Parkinson*, 909 P.2d 647, 653 (Idaho App. 1995) (“Although Dr. Chappuis testified that the M.M.P.I. is a standard and accepted psychological test, he presented no testimony from which it could be determined that the sex offender profile which Dr. Chappuis drew from that test, other tests, and clinical interviews had scientific validity or was reliable for the purpose for which it was offered in this case.”); *People v. Dobek*, 732 N.W.2d 546, 571 (Mich.App.2007) (same observation with respect to MCMI personality test); *State v. Elbert*, 831 S.W.3d 646, (Mo.App.1992) (“However, there is a world of difference between whether a psychiatric test is generally accepted for the purpose of diagnosis and treatment, and whether the test is generally accepted for the purpose of determining whether a criminal defendant fits the psychological profile of a sex offender.”); *State v. Tmalka*, 511 N.W.2d 135, 141 (Neb.App.1993) (same outcome for MCMI and MMPI test results where “there was no evidence of the personality profile, drawn from the same or similar tests given to Tlamka, of child abusers which is generally accepted as such in the psychological community”); *State v. Cavaliere*, 663 A.2d 96, 99-100 (N.H.1995) (citing various studies showing that a “significant proportion of offenders may exhibit no measurable psychopathology”); *State v. Austin*, 727 N.W.2d 790, 796 (N.D.2007) (upholding preclusion of defendant’s normal AASI test results because they “do not address nor [are] to be employed to determine a patient’s predisposition to engage in particular conduct, and therefore should not be considered in a determination of whether or not the accused committed the alleged act”).**

**10. Even in those jurisdictions that prohibit the admission of CSAAS profile evidence for the purpose of proving that a certain child had been sexually abused, the prosecution may offer expert testimony regarding the behaviors commonly found in child sex-crime victims in order to show that the charged victim’s conduct, such as delayed or piecemeal disclosure, does not render his or her allegations of sexual abuse incredible:**

Our holding in this case does not render expert psychological testimony useless in all child sexual abuse cases. There are cases in which an expert may play a valuable role as an educator, supplying the jury with necessary information about child sexual abuse in general, without offering an opinion as to whether a certain child has been sexually abused. Dr. Bollerud testified partially for this purpose when she detailed and explained the elements of the child sexual abuse accommodation syndrome. SEE GENERALLY SUMMIT, THE CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME, 7 CHILD ABUSE AND NEGLECT 177 (1983). As Dr. Bollerud testified, this syndrome consists of five characteristics commonly found in sexually abused children: secrecy; helplessness; entrapment and accommodation; delayed, inconsistent, and unconvincing disclosure of incidents of sexual abuse; and retraction of the initial disclosure. The child sexual abuse accommodation syndrome was not intended to be a diagnostic device capable of detecting whether a child has been sexually abused. *State v. J.Q.*, 252 N.J.Super. at 28, 599 A.2d at 181. Rather, it proceeds from the premise that a child has been sexually abused and seeks to explain the resulting behaviors and actions of the child. See *People v. Bowker*, 203 Cal.App.3d 385, 249 Cal.Rptr. 886, 892 (1988).

Several of the common behaviors mentioned by Dr. Bollerud, such as a child's delayed disclosure of abuse, inconsistent statements about abuse, and recantation of statements about abuse, may be puzzling or appear counterintuitive to lay observers when they consider the suffering endured by a child who is continually being abused. These behaviors also present an obvious opportunity for a defendant to superficially attack the testimony of a child victim witness during cross-examination or to argue against the child's credibility in closing statements before the jury. Therefore, expert testimony explaining the peculiar behaviors commonly found in sexually abused children may aid a jury in accurately evaluating the credibility of a child victim witness. In addressing this issue, the Connecticut Supreme Court recognized that “the overwhelming majority of courts have held that, where the defendant has sought to impeach the testimony of the minor victim based on inconsistencies, partial disclosures, or recantations relating to the alleged incidents, the state may present expert opinion evidence that such behavior by minor sexual abuse victims is common.” *State v. Spigarolo*, 210 Conn. 359, 377–78, 556 A.2d 112, 122 (citing cases), cert. denied, 493 U.S. 933, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989); see *State v. J.Q.*, 252 N.J.Super. at 28–33, 599 A.2d at 181–84 (citing cases and articles). For these reasons, we hold that the State may offer expert testimony explaining the behavioral characteristics commonly found in child abuse victims to preempt or rebut any inferences that a child victim witness is lying. This expert testimony may not be offered to prove that a particular child has been sexually abused, and a defendant is entitled to a limiting instruction that so states.

*State v. Cressey*, 628 A.2d 696, 702-03 (N.H.1993). Accord *Haakanson v. State*, 760 P.2d 1030, 1036 (Alaska App.1988) (past Alaska decisions “permit[ted] expert testimony that responds to a defense claim that a complaining witness' conduct is inconsistent with being sexually abused by

showing that similar conduct is exhibited by those who are sexually abused. These decisions do not permit testimony offered to prove that the complaining witness is sexually abused by showing that the complaining witness exhibits behavior similar to that exhibited by sexually abused children.”); *State v. Curry*, 187 Ariz. 623, 628-29, 931 P.2d 1133, 1138-39 (App.1996) (upholding Wendy Dutton’s CSAAS testimony “regarding generally shared characteristics of child sexual abuse victims, explaining such phenomena as secrecy, helplessness, coping mechanisms, responses to abuse, and ‘script memory,’” as well as “patterns of disclosure by the victim to others,” where “Dutton was quite careful to point out the limitations of the CSAAS concept and clearly pointed out that the CSAAS factors alone do not indicate whether abuse occurred in a particular case.”); *People v. Roscoe*, 168 Cal.App.3d 1093, 1100, 215 Cal.Rptr. 45 (1985) (“the expert testimony ... to permit rehabilitation of a complainant’s credibility is limited to discussion of victims as a class, supported by references to literature and experience [such as an expert normally relies upon] and does not extend to discussion and diagnosis of the witness in the case at hand”); *State v. Favoccia*, 51 A.2d 1002, 1023-24 (Conn.2012) (“Reconciling the well reasoned sister state decisions with our own case law, we conclude that our concerns about indirect vouching ... require us to limit expert testimony about the behavioral characteristics of child sexual assault victims ... to that which is stated in general or hypothetical terms, and to preclude opinion testimony about whether the specific complainant has exhibited such behaviors,” and explicitly reaffirming expert testimony that “minor victims typically fail to provide complete or consistent disclosures of the alleged sexual abuse”); *Steward v. State*, 652 N.E.2d 490, 492-98 (Ind.1995) (collecting authorities prohibiting the use of CSAAS profile evidence as substantive evidence of guilt, but upholding expert testimony “explaining victim behaviors seemingly inconsistent with their allegations” of sexual abuse); *State v. Foret*, 628 So.2d 1116, 1129 (La.1993) (“Some jurisdictions have allowed its admission for the limited purpose of rebutting attacks on the victim’s credibility based on inconsistent statements, limited disclosures, or recantations of the testimony. [Citations omitted.] Other jurisdictions have flatly refused its admission at all. [Citations omitted]. After weighing the varying approaches, this court has decided to follow the former approach, and allow the testimony to be admitted for very limited purposes.”); *State v. Doan*, 1 Neb.App. 484, 498 N.W.2d 804, 809 (Neb.App.1993) (“In light of the state of social science research and case law as of this writing, we hold that CSAAS evidence is generally reliable to explain secrecy, belated disclosure and recantation by a child sex abuse victim; that syndrome evidence including CSAAS is not reliable to prove that sex abuse, in fact, occurred; and that an expert social science witness has neither the legal authority nor the scientific qualifications to opine as to the truthfulness of the statement of another witness.”); *State v. Sargent*, 813 A.2d 402, 408 (N.H.2002) (“[E]xpert testimony on the general characteristics or tendencies of abused children or other abuse victims [is] admissible, while testimony about specific details based upon the individual facts or psychological analysis of any victim is not.”); *State v. J.Q.*, 617 A.2d 1196, 1209-10 (N.J.1993) (collecting cases); *People v. Carroll*, 740 N.E.2d 1084, 1090 (N.Y.2000) (upholding admission of expert testimony about child sexual abuse accommodation syndrome “for the purpose of instructing the jury about possible reasons why a child might not immediately report incidents of sexual abuse” and emphasizing that expert “never opined that defendant committed the crimes, that defendant’s stepdaughter was sexually abused, or even that her specific actions and behavior were consistent with such abuse”); *State v. Gokey*, 574 A.2d 766, 770 (Vt.1990) (allowing expert testimony that showed that victim’s delayed disclosure of sexual abuse and her continued visitation of the

defendant's residence while the abuse was still ongoing constituted conduct "consistent with the behavior of child sexual abuse victims generally" and necessary to debunk the jury's misconceptions to the contrary); *Frenzel v. State*, 849 P.2d 741, 749 (Wyo.1993) ("Qualified experts on child sexual abuse may, therefore, use evidence of CSAAS characteristics of sexually abused children for the sole purpose of explaining a victim's specific behavior which might be incorrectly construed as inconsistent with an abuse victim or to rebut an attack on the victim's credibility. For example, if the facts of a particular case show that the victim delayed reporting the abuse, recanted the allegations, kept the abuse secretive, or was accommodating to the abuse, then testimony about that particular characteristic of CSAAS would be admissible to dispel any myths the jury may hold concerning that behavior.").

### **Recommendations:**

(A) Continue to present blind expert testimony that debunks the common misperceptions about counterintuitive behaviors, such as delayed and piecemeal disclosure and recantations, that child sex-crime victims exhibit.

(B) Continue to avoid asking the expert hypothetical questions (on direct examination) that mirror the facts of the victim in the case at bar, or questions that deal with the victim specifically. If the defendant's cross-examination challenges certain particular aspects of the victim's conduct, your redirect examination may properly cover the specific acts and omissions that were challenged by the defense.

(C) Continue to avoid asking the expert about whether the victim's conduct is consistent with him or her having been sexually abused.

(D) Continue to present testimony that there is no profile for sexually abused children, and that their reactions and behaviors are varied.

(E) Because the experts cannot offer testimony comparing the victim against a profile in to establish the commission of the charged sexual offense, the recommendation here is that the State should *not* argue during closing argument that the victim fit the profile of being sexually abused. Instead, the prosecutor should limit his/her closing remarks to the specific behaviors that the defense identified as reasons to disbelieve the witness and cite the expert's testimony that such conduct has been reported in other sex-crime victims.

**11. Note that the defense bar often attempts to conflate inadmissible profile evidence with proper expert testimony regarding the *modus operandi* used by criminals to commit certain offenses. Federal and state courts have resoundingly held that "government agents or similar persons may testify to the general practices of criminals to establish the defendants' *modus operandi*." *United States v. Gil*, 58 F.3d 1414, 1422 (9<sup>th</sup> Cir. 1995) (quoting *United States v. Johnson*, 735 F.2d 1200, 1202 (9<sup>th</sup> Cir. 1984)) (collecting cases). *Accord United States v. Urbina*, 431 F.3d 305, 311 (8<sup>th</sup> Cir. 2005) (rejecting defendant's attempt to characterize as profile evidence a DEA agent's testimony that "in his experience he had never seen a drug dealer entrust as large a quantity of drugs as were found in [defendant's] auxiliary gas tank to a**

courier who was not aware of what he was transporting,” because it was expert testimony “concerning the modus operandi of drug dealers”); *United States v. Murillo*, 255 F.3d 1169, 1176 (9<sup>th</sup> Cir. 2001) (“Yet the type of evidence offered at Murillo’s trial was not simply of a drug courier profile. . . . Rather, the evidence offered . . . was expert testimony of the modus operandi of couriers involved in drug trafficking organizations.”); ”); *United States v. Klimavicius-Vilora*, 144 F.3d 1249, 1259-60 (9<sup>th</sup> Cir. 1998) (rejecting characterization as “profile” evidence expert testimony “about fifteen different smuggling routes over air, land, and sea”); *United States v. Webb*, 115 F.3d 711, 715 (9<sup>th</sup> Cir. 1997) (“More recently, however, we have rejected the argument that *modus operandi* expert testimony raises concerns similar to those raised by drug profile testimony.”); *United States v. Buchanan*, 70 F.3d 818, 832-33 & n.19 (5<sup>th</sup> Cir. 1996) (holding that expert opinion testimony that defendant’s conduct was consistent with guarding drug-laden car was not profile evidence but related instead to modus operandi of drug traffickers); *United States v. Jefferson*, 925 F.2d 1242, 1253 n.10 (10<sup>th</sup> Cir. 1991) (holding that a narcotics agent’s testimony regarding the defendant’s use of a pager as “too limited” to constitute profile evidence, which consists of a “point by point examination of profile *characteristics*”) (quoting *United States v. Quigley*, 890 F.2d 1019, 1023 (8<sup>th</sup> Cir. 1989)) (emphasis in original); *United States v. White*, 890 F.2d 1012, 1014 (8<sup>th</sup> Cir. 1989) (“However, it is also well established that it is within a federal court’s discretion to allow law enforcement officials to testify as experts concerning the modus operandi of drug dealers and criminals in areas concerning activities which are not something with which most jurors are familiar.”); *State v. Kevil*, 111 Ariz. 240, 247, 527 P.2d 285, 292 (1974) (expert testimony regarding *modus operandi* of “role jobs” upheld); *State v. Gonzalez*, 229 Ariz. 550, 553-55 278 P.3d 328, 331-33, ¶¶ 13-19 (App.2012) (collecting cases distinguishing profile and *modus operandi* evidence); *People v. Montalvo-Lopez*, 215 P.3d 1139, 1143 (Colo.App.2008) (rejecting characterization as “profile” evidence expert testimony identifying “Interstate 70 [as] a corridor for transporting drugs from the West Coast,” and Chicago’s status as “the largest drug-hub” in America); *People v. Ramirez*, 1 P.3d 223, 227 (Colo.App.1999) (“Drug courier testimony focuses on specific characteristics that are identified with drug dealers, but which also may be possessed by many innocent persons. In contrast, the focus of expert testimony here was to inform the jury of information they would not normally possess about the ‘modus operandi’ of those who generally engage in drug trafficking.”); *Johnson v. State*, 813 A.2d 161, 167-68 (Del.2001) (rejecting profile-related ineffectiveness claim predicated upon counsel’s failure to object to “testimony about New York City being a major source city and people using rental cars to transport drugs,” which was deemed “part of some very matter of fact testimony about how drugs get to Dover”); *Commonwealth v. Frias*, 712 N.E.2d 1178, 1181 (Mass.App.1999) (collecting Massachusetts and federal cases distinguishing modus operandi and profile evidence); *People v. Rodriguez*, 650 N.W.2d 96, 112 (Mich.App.2002) (testimony that defendant’s conduct was consistent with bodyguard during drug transaction was modus operandi, not profile, evidence); *Milliorn v. State*, 755 So.2d 1217, 1223–24, ¶ 26 (Miss.App.1999) (“Explaining to the jury why someone transporting drugs would use a rental car is similar to explaining why someone possessing crack cocaine with intent to distribute would need scales, razor blades, plastic bags, and other relatively innocent items.”); *State v. Avendano-Lopez*, 904 P.2d 324, 327 (Wash.App.1995) (holding that expert testimony explaining “the arcane world of drug dealing and certain drug transactions” was “not ‘criminal profile’ testimony”).

**12. Indeed, numerous courts have upheld expert testimony regarding the *modus operandi* employed by child molesters to groom and abuse their victims.** See *United States v. Batton*, 602 F.3d 1191, 1200-02 (10<sup>th</sup> Cir. 2010); *United States v. Hitt*, 473 F.3d 146, 158 (5<sup>th</sup> Cir. 2006); *United States v. Hayward*, 359 F.3d 631, 636-37 (3<sup>rd</sup> Cir. 2004); *United States v. Long*, 328 F.3d 655, 665-68 (D.C. Cir. 2003); *United States v. Romero*, 189 F.3d 576, 584-85 (7<sup>th</sup> Cir. 1999); *United States v. Cross*, 928 F.2d 1030, 1050 n.66 (11<sup>th</sup> Cir. 1991); *Jones v. United States*, 990 A.2d 970, 978 (D.C.App.2010); *Morris v. State*, 361 S.W.3d 649, 669 (Tex.Crim.App.2011). Cf. *United States v. Anderson*, 851 F.2d 384, 393-94 (D.C. Cir. 1988) (*modus operandi* expert testimony on pimp/prostitute relationship). But see *United States v. Raymond*, 700 F.Supp.2d 142, 152-54 (D.Me.2010) (declining to follow *Romero* and its progeny and finding Agent Lanning’s expert testimony to constitute unreliable “profile” evidence and unduly prejudicial under Rule 403). The most recent case that adopted this rule is worth quoting here:

¶ 26 In [*Salcedo v. People*, 999 P.2d 833, 837 (Colo.2000)], the court held that expert testimony on drug courier profiles is inadmissible as substantive evidence of guilt. Federal courts have similarly held. See, e.g., *United States v. Long*, 328 F.3d 655, 666 (D.C.Cir.2003). However, the “profile” label is not helpful in distinguishing admissible from inadmissible expert testimony. *Id.* Instead, courts focus on the purpose for which the evidence is offered: whether it is improper propensity evidence designed to show the defendant's character, or whether it instead seeks to aid the jury in understanding a pattern of behavior beyond its normal experience. *Id.* Thus, “experts may testify regarding the *modus operandi* of a certain category of criminals where those criminals' behavior is not ordinarily familiar to the average layperson.” *Id.*

#### D. Application—Moore

##### 1. Profile Testimony

¶ 27 Here, the court qualified Ms. Kandy Moore as an expert in child sexual abuse and sex offender characteristics. Defendant asserts that she testified to sexual offender profile characteristics when she testified that (1) child molesters “groom” their victims by participating in activities with them that tend to isolate and confuse the child as to whether the offender is doing something improper, and gave examples of overt and subtle grooming tactics; (2) only about five to ten percent of child victims are assaulted by a stranger; (3) in her clinical practice, over half of her cases involved situations in which the child had been assaulted by a family member; (4) child molesters are likely to exhibit some type of minimization or denial about what they have done, and gave examples of that; and (5) some child molesters may justify their actions, and she gave examples of forms of justification.

¶ 28 Following the analytical approach of *Long, id.* at 667, we conclude that this evidence was not profile evidence, but was designed to aid the jury regarding the *modus operandi* of sex offenders and was useful because jurors cannot be presumed to have knowledge of such characteristics. Here, where defendant denied that he committed any

offense, the fact that his *modus operandi* was consistent with the *modus operandi* of sex offenders generally made it more likely than not that he committed the offenses at issue.

¶ 29 Accordingly, *Salcedo* is distinguishable. As the supreme court clarified in *Masters v. People*, 58 P.3d at 993, the holding in *Salcedo* is very narrow, applying only to exclude drug courier profiles as substantive evidence of a defendant's guilt. The profile presented in *Salcedo* was problematic because it was used to prove that the defendant was a drug courier. Indeed, the expert witness in *Salcedo* testified that the defendant “fit” the courier profile. *Salcedo*, 999 P.2d at 836.

¶ 30 Here, in contrast, Moore did not testify that defendant “fit” the characteristics of a sex offender, nor did the prosecutor argue that her testimony should be used for that purpose. Instead, Moore provided the jury with background information on patterns of child sexual abuse and behaviors that she had observed in her clinical practice of treating both victims and offenders. See *United States v. Batton*, 602 F.3d 1191, 1202 (10<sup>th</sup> Cir. 2010) (expert testimony that sex offenders are generally not strangers to their victims properly admitted because testimony concerned criminal methods outside the common knowledge of lay jurors); *United States v. Hitt*, 473 F.3d 146, 158–59 (5<sup>th</sup> Cir. 2006) (rejecting the defendant's profile testimony argument and concluding that admission of *modus operandi* of child molesters was not an abuse of discretion); *United States v. Hayward*, 359 F.3d 631, 636–37 (3d Cir. 2004) (expert testimony regarding grooming techniques of child molesters admissible); *Long*, 328 F.3d at 667 (upholding trial court's admission of expert witness testimony regarding the behavior and characteristics of sex offenders, which included a description of the “grooming” process).

\*5 ¶ 31 *United States v. Gillespie*, 852 F.2d 475, 479 (9<sup>th</sup> Cir. 1988), on which defendant relies, is inapposite. There, the court held that the trial court's admission of testimony concerning the “characteristics of a molester” was improper character testimony under Fed.R.Evid. 404(a). The court ruled the evidence inadmissible because the defendant did not place his character in issue during the trial. But here, the evidence was not offered under CRE 404(a).

¶ 32 *United States v. Banks*, 36 M.J. 150, 161–62 (C.M.A.1992), is likewise distinguishable because the evidence at issue there was proffered under Mil. R. Evid. 404(a), the equivalent rule to Fed.R.Evid. 404(a), as expert character profile evidence to substantively establish guilt. Here, in contrast, the evidence was offered as *modus operandi* evidence and to provide the jury with background information on patterns of child sexual abuse and behaviors.

¶ 33 The evidence was also permissible to rebut defendant's assertion that his confession was a product of police coercion and stated only what the police wanted to hear, and his assertion that KT had fabricated the assaults. See *Long*, 328 F.3d at 667–68 (acknowledging testimony was helpful to rebut defense of victim's fabrication).

People v. Conyac, --- P.3d ----, 2014 WL 335597 \*\*4-5, ¶¶ 26-33 (Colo. App. Jan. 30, 2014) (not yet released in permanent Pacific Reporters, so Shepardize before citing).

**The Daubert/Joiner/Kumho trilogy: Arizona's new standard.**

**1. On September 8, 2011, the Arizona Supreme Court amended Arizona Rule of Evidence 702 to so that the following standard would apply to expert testimony during trials held on and after January 1, 2012:**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

**2. This amended version is identical to Federal Rule of Evidence 702, which Congress amended in 2000 to codify the principles the Supreme Court articulated in the so-called *Daubert* trilogy. Arizona courts consider federal precedent construing identically worded procedural rules to be “instructive” and “persuasive” authority. See Ariz. R. Evid. Prefatory Comment to 2012 Amendments (“Where the language of an Arizona rule parallels that of a federal rule, federal court decisions interpreting the federal rule are persuasive but not binding with respect to interpreting the Arizona rule.”). *Accord City of Tucson v. Superior Court*, 167 Ariz. 513, 515, 809 P.2d 428, 430 (1991); *Orme School v. Reeves*, 166 Ariz. 301, 304, 802 P.2d 1000, 1003 (1990); *Goy v. Jones*, 205 Ariz. 421, 423, ¶ 7, 72 P.3d 351, 353 (App.2003); *State v. Grijalva*, 137 Ariz. 10, 14-15, 667 P.2d 1336, 1340-41 (App.1983).**

**3. Consequently, the comment to the 2000 amendment to Federal Rule of Evidence 702 appears in its entirety below, for the reader's convenience, with boldface to emphasize the passages that apply to the expert testimony typically offered in sex-crime prosecutions in Arizona:**

Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. See also *Kumho*, 119 S.Ct. at 1178 (citing the Committee Note to the proposed amendment to

Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987).

*Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested---that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." 119 S.Ct. at 1175.

No attempt has been made to "codify" these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to *Kumho*, 119 S.Ct. at 1175, *see Tyus v. Urban Search Management*, 102 F.3d 256 (7<sup>th</sup> Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). *See also Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3<sup>rd</sup> Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

(1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9<sup>th</sup> Cir. 1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court “may conclude that there is simply too great an analytical gap between the data and the opinion proffered”).

(3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9<sup>th</sup> Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). *Compare Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting.” *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7<sup>th</sup> Cir. 1997). *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (*Daubert* requires the trial court to assure itself that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field”).

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1175 (1999) (*Daubert's* general acceptance factor does not “help show that an expert's testimony is reliable where the discipline itself lacks reliability, as for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.”), *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5<sup>th</sup> Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6<sup>th</sup> Cir. 1988) (rejecting testimony based on “clinical ecology” as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. *See Kumho*, 119 S.Ct. 1167, 1176 (“[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. *See, e.g., Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 155 (3<sup>rd</sup> Cir. 1999) (“not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules.”); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317, n.5 (9<sup>th</sup> Cir. 1995) (noting that some expert disciplines “have the courtroom as a principal theatre of operations” and as to these

disciplines “the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.”).

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a “seachange over federal evidence law,” and “the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.” *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. See *Kumho Tire Co. v. Carmichael*, 119 S.Ct.1167, 1176 (1999) (noting that the trial judge has the discretion “both to avoid unnecessary ‘reliability’ proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.”).

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. See, e.g., *Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 160 (3<sup>rd</sup> Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3<sup>rd</sup> Cir. 1994), proponents “do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable.... The evidentiary requirement of reliability is lower than the merits standard of correctness.” See also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (9<sup>th</sup> Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by “a recognized minority of scientists in their field.”); *Ruiz-Troche v. Pepsi Cola*, 161 F.3d 77, 85 (1<sup>st</sup> Cir. 1998) (“*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.”).

The Court in *Daubert* declared that the “focus, of course, must be solely on principles and methodology, not on the conclusions they generate.” 509 U.S. at 595. Yet as the Court later recognized, “conclusions and methodology are not entirely distinct from one another.” *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Under the amendment, as under *Daubert*, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. See *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9<sup>th</sup> Cir. 1996). The amendment specifically

provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3<sup>rd</sup> Cir. 1994), “any step that renders the analysis unreliable ... renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.”

**[N.B. The boldfaced text in following paragraphs are directly applicable to generalized testimony regarding the counterintuitive behaviors of child sex-crime victims that Arizona prosecutors typically offer through blind experts like Wendy Dutton and Dr. Tasha Boychuk:]**

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. **Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony “fit” the facts of the case.**

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1171 (1999) (“We conclude that *Daubert's* general holding--setting forth the trial judge's general ‘gatekeeping’ obligation--applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.”). While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5<sup>th</sup> Cir. 1997) (“[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique.”). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of

expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. SEE, E.G., AMERICAN COLLEGE OF TRIAL LAWYERS, STANDARDS AND PROCEDURES FOR DETERMINING THE ADMISSIBILITY OF EXPERT TESTIMONY AFTER *DAUBERT*, 157 F.R.D. 571, 579 (1994) (“[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the ‘knowledge and experience’ of that particular field.”).

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. **While the terms “principles” and “methods” may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.**

**Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. See, e.g., *United States v. Jones*, 107 F.3d 1147 (6<sup>th</sup> Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears Roebuck*, 946 F.Supp. 1241, 1248 (M.D.La. 1996) (design engineer's testimony can be admissible when the expert's opinions “are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches”). See also *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1178 (1999) (stating that “no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.”).**

**If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply “taking the expert's word for it.” See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9<sup>th</sup> Cir. 1995) (“We've been presented with**

only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough.”). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. See *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7<sup>th</sup> Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded). See also *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (“[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.”).

Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying “facts or data.” The term “data” is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703. The language “facts or data” is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. *Id.*

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on “sufficient facts or data” is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the “reasonable reliance” requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a sufficient basis of information—whether admissible information or not—is governed by the requirements of Rule 702.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony. SEE DANIEL J. CAPRA, THE *DAUBERT* PUZZLE, 38 GA.L.REV. 699, 766 (1998) (“Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review.”). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule. See, e.g., *Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1<sup>st</sup> Cir. 1997) (discussing the application of *Daubert* in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 736, 739 (3<sup>rd</sup> Cir. 1994) (discussing the use of *in limine* hearings);

*Claar v. Burlington N.R.R.*, 29 F.3d 499, 502-05 (9<sup>th</sup> Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an “expert.” This was done to provide continuity and to minimize change. The use of the term “expert” in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an “expert.” Indeed, there is much to be said for a practice that prohibits the use of the term “expert” by both the parties and the court at trial. Such a practice “ensures that trial courts do not inadvertently put their stamp of authority” on a witness's opinion, and protects against the jury's being “overwhelmed by the so-called ‘experts.’” HON. CHARLES RICHEY, PROPOSALS TO ELIMINATE THE PREJUDICIAL EFFECT OF THE USE OF THE WORD “EXPERT” UNDER THE FEDERAL RULES OF EVIDENCE IN CRIMINAL AND CIVIL JURY TRIALS, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term “expert” in jury trials).

Comment to 2000 Amendment to Federal Rules of Evidence Rule 702, 28 U.S.C.A. (emphasis added).

**4. The Arizona Supreme Court’s comment to the 2012 amendment to Rule 702 reads as follows:**

The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702, as restyled. The amendment recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue. The amendment is not intended to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony, nor is the amendment intended to permit a challenge to the testimony of every expert, preclude the testimony of experience-based experts, or prohibit testimony based on competing methodologies within a field of expertise. The trial court's gatekeeping function is not intended to replace the adversary system. Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

A trial court's ruling finding an expert's testimony reliable does not necessarily mean that contradictory expert testimony is not reliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Where there is contradictory, but reliable, expert testimony, it is the province of the jury to determine the weight and credibility of the testimony.

This comment has been derived, in part, from the Committee Notes on Rules--2000 Amendment to Federal Rule of Evidence 702.

**5. The consequence of this amendment is the death knell of Arizona’s former hybrid regime for scientific and experience-based expert testimony set forth in *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000) and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). See ARIZONA PRACTICE SERIES, TRIAL; HANDBOOK FOR ARIZONA LAWYERS, BENNETT EVAN COOPER, ET AL., § 15:6 (2012) (“Ariz. R. Evid. 702 was rewritten in 2012 to adopt the restyled form of Fed.R.Evid.702. This amendment moved Arizona from its traditional *Frye* standard for expert testimony to the current *Daubert* standard applied by the federal courts.”); ARIZONA’S ADOPTION OF FEDERAL RULE OF EVIDENCE 702: LIFE UNDER THE NEW, OLD, *DAUBERT* STANDARD, BRIAN POLLOCK & TORE MOWATT-LARSEN, 48-MAR ARIZ. ATT’Y 42 (2012) (“As of January 1, 2012, *Frye/Logerquist* is no longer the standard governing the admissibility of expert testimony in Arizona; the *Daubert/Kumho Tire* reliability test is”).**

**6. If any doubt remained about whether *Daubert* governs “soft scientific” expert opinion testimony, the Arizona Court of Appeals resolved that question by holding that Rule 702 and *Daubert* does apply to mental health expert testimony, albeit in the context of a discharge hearing under SVPA:**

The Arizona Supreme Court amended Arizona Rule of Evidence 702, effective January 1, 2012, to adopt Federal Rule of Evidence 702, “as restyled.” Ariz. R. Evid. 702, Comment to 2012 Amendment. Under Rule 702, the superior court may allow expert testimony that may “help the trier of fact to understand the evidence or to determine a fact in issue” if the proffered testimony is “based on sufficient facts or data” and “is the product of reliable principles and methods” and if “the expert has reliably applied the principles and methods to the facts of the case.” Ariz. R. Evid. 702(a)-(d). We construe the new Arizona rule in accordance with its federal counterpart. See Ariz. R. Evid. Prefatory Comment to 2012 Amendments (“Where the language of an Arizona rule parallels that of a federal rule, federal court decisions interpreting the federal rule are persuasive but not binding with respect to interpreting the Arizona rule.”).

The *Daubert* Court examined the trial judge's evidentiary gatekeeping function in a case involving expert testimony offered to prove that a drug given to a pregnant woman caused a birth defect in her child. The Court concluded that the trial judge should preliminarily assess proffered expert scientific testimony to determine “whether the reasoning or methodology underlying the testimony is scientifically valid and ... whether that reasoning or methodology properly can be applied to the facts in issue.” 509 U.S. at 592–93. The Court set out a number of non-exclusive factors for determining whether scientific evidence is admissible, including whether the scientific methodology has been tested and subjected to peer review, the “known or potential rate of error,” and whether the methodology has “general acceptance.” Id. at 593–94.

Citing *dicta* in *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1298 (8<sup>th</sup> Cir.1997), the Center argues that the *Daubert* factors do not apply to expert

testimony such as that proffered by Goldenstein because psychology is a “soft” science without “the exactness of hard science methodologies.” We agree that “the factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999) (quotation omitted). The nature of the inquiry under Rule 702 “must be tied to the facts of a particular case.” *Id.* (quotation omitted).

The Arizona Supreme Court has made clear that “trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue.” Ariz. R. Evid. 702, Comment to 2012 Amendment. Rule 702 requires that when, as here, an expert proposes to offer an opinion based on scientific knowledge, training and literature, the trial judge must ensure that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire*, 526 U.S. at 152; *see also Foreman v. Am. Road Lines, Inc.*, 623 F.Supp.2d 1327, 1333 n.5 (S.D.Ala.2008) (gatekeeping function applies to expert testimony offered by psychologists). Toward that end, “the trial judge must determine whether the testimony has ‘a reliable basis in the knowledge and experience of the relevant discipline.’” *Kumho Tire*, 526 U.S. at 149 (quoting *Daubert*, 509 U.S. at 592).

As the Center argues, the specific factors set out in *Daubert* do not readily fit the evaluation of the reliability of expert psychological testimony. *See, e.g., Blanchard v. Eli Lilly & Co.*, 207 F.Supp.2d 308, 317 (D.Vt.2002) (trial judge's “task ... is not to apply a rigid checklist to proposed opinion testimony, but to determine if it is based upon sufficient facts or data and is the product of reliable principles and methods, and if the principles and methods have been applied reliably to the facts of the case”). Nevertheless, other courts have applied the principles underlying *Daubert* in ascertaining the reliability of expert psychological testimony. *See, e.g., Med. Assurance Co., Inc. v. Miller*, 779 F.Supp.2d 902, 913–14 (N.D.Ind.2011) (psychologist's testimony inadmissible because it was not supported by facts and was product of unreliable application of generally accepted methodology); *North v. Ford Motor Co.*, 505 F.Supp.2d 1113, 1119 (D.Utah 2007) (rejecting testimony of psychologist who relied on incomplete information); *Algarin v. New York City Dep't of Corr.*, 460 F.Supp.2d 469, 477–78 (S.D.N.Y.2006) (precluding expert testimony that failed to cite generally accepted methodology); *Coble v. State*, 330 S.W.3d 253, 277–80 (Tex.Crim.App.2010) (predictive expert testimony inadmissible when psychiatrist did not cite authorities supporting his methodology; “Soft science does not mean soft standards.”); *cf. Samaniego v. City of Kodiak*, 80 P.3d 216, 219 & n.8–9 (Alaska 2003) (affirming trial judge's decision to admit psychiatric testimony, noting that “[a] bare claim that psychiatric evidence is unreliable does not subject forensic psychiatry to a mini-trial in every case”).

Applying these principles, the superior court must exercise its discretion to determine the reliability and relevance of expert mental-health testimony offered in a discharge hearing under the SVPA by considering, *inter alia*, the facts, data, theories and methods underlying the expert's opinion. In determining the reliability and relevance of such testimony, the court has great discretion to decide whether to set a pretrial hearing to evaluate the proposed testimony. *See Kumho Tire*, 526 U.S. at 152. That is, although Rule 702 requires the court to consider the reliability and relevance of psychological testimony offered in a discharge hearing, the rule does not require the court to set a pretrial hearing to make that evaluation. Particularly in a bench trial such as a discharge proceeding, the court may decide to hear the evidence and objections to it and rule on its admissibility without conducting a separate hearing. *See In re Salem*, 465 F.3d 767, 777 (7<sup>th</sup> Cir. 2006).

The Center argues no pretrial hearing was required in this case because, contrary to Charles's contention, Goldenstein did not use “unguided clinical judgment” in evaluating Charles, but instead applied “research-guided clinical judgment” in that evaluation. Whether to set a pretrial hearing to resolve such a dispute is peculiarly within the discretion of the superior court, and we have no reason to conclude the court in this case abused its discretion in doing so.

*Arizona State Hospital/Arizona Community Protection and Treatment Center v. Klein*, 231 Ariz. 467, 473-74, ¶¶ 26-32, 296 P.3d 1003, 1009-10 (App.2013).

**7. Given the Arizona Supreme Court’s comment that federal precedent construing Federal Rule of Evidence 702 constitutes a bountiful source of guidance in determining the admissibility of various types of expert testimony, this section will relate cases that have applied *Daubert* and its progeny.**

**A. The following decisions have upheld expert testimony regarding the behavioral characteristics of child-molestation victims against *Daubert* challenges to the reliability of the proffered testimony.** *See United States v. Bighead*, 128 F.3d 1329, 1330-31 (9<sup>th</sup> Cir. 1997) (upholding testimony about “script memory” and “delayed disclosure” commonly found among victims); *State v. Buccheri-Bianca*, 233 Ariz. 324, 331-33, ¶¶ 26-30, 312 P.3d 123, 130-32 (App.2013) (rejecting *Daubert* challenge to Wendy Dutton’s testimony as “non-scientific”); *State v. Salazar-Mercado*, 232 Ariz. 256, 261-62, ¶¶ 17-19, 304 P.3d 543, 548-49 (App.2013) (upholding against *Daubert* challenge Wendy Dutton’s testimony regarding behavioral characteristics of children sex crime victims “cold” testimony was “not based on sufficient facts or data” because it “consisted merely of generalizations of how abuse victims behave”); *State v. Greene*, 951 So.2d 1226, 1237-28 (La.App.2007) (upholding testimony regarding delayed disclosure by a doctor who was qualified in the field of forensic pediatrics and child abuse); *State v. Torregano*, 875 So.2d 842, 845-48 (La.App.2004) (same); *State v. Edelman*, 593 N.W.2d 419, 422-23, ¶¶ 8-18 (S.D.1999) (upholding general testimony regarding CSAAS to explain behaviors of child sex-crime victims). *Cf. United States v.*

*King*, 703 F.Supp.2d 1063, 1072-73 (D.Haw.2010) (in prosecution for sex-trafficking offenses, district court properly ruled that a pediatrician's expert testimony on the dynamics of pimp-prostitute relationship satisfied Federal Rule of Evidence 702 and *Daubert* because she had extensive experience and training as developmental and forensic pediatrician, had presented at numerous national and international conferences regarding child sexual exploitation and human trafficking, had authored books and training materials on sexual exploitation, was lead editor of two-volume treatise on child sexual exploitation, and taught a 40-hour class on prostitution four to six times per year, training investigators, prosecutors, judges and others on sexual exploitation through prostitution, including training related to pimp-prostitute relationship dynamics).

**B. *Daubert* is not satisfied when the prosecution offers CSAAS evidence to prove that the charged victim had been abused because she/he possesses the same characteristics as other abused children—this result is hardly surprising because Dr. Summit himself declared that CSAAS was not intended to diagnose/identify sexually abused children, and experts in this field have not reached any consensus about what characteristics will be found to exist in sexually-abused children. Even so, *Daubert* poses no bar “when a child's actions after an alleged incident of sexual abuse have the potential to lead a jury to conclude that the child is lying, [in which case] the testimony of a qualified expert may be beneficial to offer an alternative explanation for the child's specific behavior so that the jury may more accurately judge the credibility of the child victim.”** *State v. Chamberlain*, 628 A.2d 704, 706-07 (N.H.1993). *Accord Steward v. State*, 652 N.E.2d 490, 498-99 (Ind.1995) (finding *Daubert* not satisfied when CSAAS is offered to prove that the charged victim was molested by comparing his/her behaviors against the syndrome's components, but allowing expert testimony to explain the victim's counterintuitive behaviors attacked by the defendant because “research generally accepted as scientifically reliable recognizes that child victims of sexual abuse may exhibit unexpected behavior patterns seemingly inconsistent with the claim of abuse”); *State v. Foret*, 628 So.2d 1116, 1222-30 (La.1992) (despite finding CSAAS insufficiently reliable to identify sexually abused children, reaffirming that courts may admit expert testimony regarding specific behaviors manifested by victims that seem incompatible with having been sexually abused).

**C. Courts have found the *Daubert/Joiner/Kumho* trilogy satisfied in the context of expert testimony regarding the *modus operandi* of child molesters.** *See United States v. Batton*, 602 F.3d 1191, 1200-02 (10<sup>th</sup> Cir. 2010); *United States v. Hitt*, 473 F.3d 146, 158 (5<sup>th</sup> Cir. 2006); *United States v. Long*, 328 F.3d 655, 665-68 (D.C. Cir. 2003); *United States v. Romero*, 189 F.3d 576, 584-85 (7<sup>th</sup> Cir. 1999); *Jones v. United States*, 990 A.2d 970, 978 & n.30 (D.C.App.2010); *Morris v. State*, 361 S.W.3d 649, 672 n.9 (Tex.Crim.App.2011) (Cochran, J., concurring).

**D. Additional post-*Daubert* authority that we can cite in support of expert testimony regarding the *modus operandi* of child molesters (and implicitly the five**

**stages of victimization) originates from the analogous drug-trafficking context.** See *United States v. Wilson*, 484 F.3d 267, 273-77 (4<sup>th</sup> Cir. 2007) (collecting cases and upholding the admission of expert opinion testimony regarding the meaning of code words used by wiretap targets during telephonic conversations); *United States v. Perez*, 280 F.3d 318, 341-42 (3<sup>rd</sup> Cir. 2002) (upholding the admission of the expert testimony of a detective with 32 years of experience regarding how drug traffickers use cell phones and pagers to evade location by police) (collecting cases); *United States v. Gil*, 58 F.3d 1414, 1421–22 (9<sup>th</sup> Cir.1995) (ruling expert testimony regarding how drug-traffickers employ telephone pagers and public telephones to avoid detection by police was properly admitted).

**E. Cases that found various other forms of expertise to satisfy *Daubert* provide additional support.** See *United States v. Bynum*, 604 F.3d 161, 167-68 (4<sup>th</sup> Cir. 2010) (upholding expert testimony of experienced forensic or medical professionals that alleged child pornography depicted actual children); *United States v. Two Elk*, 536 F.3d 890, 903-04 (8<sup>th</sup> Cir. 2008) (*Daubert* allowed medial expert testimony regarding whether the charged molestation victim’s genital injuries were “acute”); *United States v. Hankey*, 203 F.3d 1160 1167-70 (9<sup>th</sup> Cir. 2000) (upholding testimony of police gang expert that defendant and co-defendant were in affiliated gangs, that “code of silence” prohibited testifying against affiliated gang member, and that violation of code would result in member being beaten up or killed); *United States v. Jones*, 107 F.3d 1147, 1156-60 (6<sup>th</sup> Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail).

### **The upshot:**

**1. *Daubert* will pose a problem only when the State offers CSAAS expert testimony to prove the charged offense by showing that the charged victim exhibits the same traits or behaviors as other sexually abused children, due to the unreliability of applying CSAAS to diagnose sexual abuse.**

**2. *Daubert* and *Kumho* will allow an expert to testify that certain behaviors that seemingly contradict allegations of sexual abuse—like delayed disclosure and recantations—are instead common among sexually abused children. The implicit rationale is that the expert’s testimony is permissible because of his repeated exposure to the phenomenon at issue during the course of his professional work.**